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*Editor-in-Chief:* HESSEL E. YNTEMA

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# *The American Journal of* COMPARATIVE LAW

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HESSEL E. YNTEMA

# Comparative Law and Humanism

Legal science and humanism have been inseparably joined in the historical development of modern culture. The renaissance of learning after the dissolution of the Roman Empire began with the inauguration of Romanist legal studies at Bologna at the end of the 11th century, prompted by the discovery of the manuscripts of the Code and the Digest. This occurrence and the construction of the vulgate text by the glossators were scarcely significant in themselves; but the fact that the restoration of the basic texts of the civil law inspired intensive study of the classic jurisprudence of Rome as the common law of Western Europe, stimulating the rapid spread of legal instruction in the nascent universities, was of transcendent importance. This not only preserved for posterity the refinements of the most elevated legal thinking in the ancient world, but it also promoted the development of other branches of knowledge, as humanism zealously resurrected the manuscripts and monuments of antiquity in other fields as well as law. From the seminaries devoted to instruction in the canon and civil laws have come the most famous universities of today.

The humanistic movement, in which legal study thus constituted a primary element, vitally contributed to the development of Western civilization. First and doubtless most significant of all, it introduced a rational discipline in which the future leaders of Europe were exposed to the classical conceptions of Greek philosophy and Roman law, in which they were taught to think, and as an inevitable result also to question and to experiment. In the second place, the study of the civil-law conceptions, in which the long effort of Roman legal genius to realize justice in the relations between individual human beings was formulated, reflecting the experience of the evolution during a thousand years of a small city-state into a cosmopolitan empire, reinforced the Christian-Stoic doctrine of the inherent dignity of man; the civil law in essence was a practical definition of human rights, an authoritative rational criterion to which those who sought justice could appeal. In the third place, the stereotyped forms of instruction that developed to inculcate the classic subject matter of law and other faculties, and the wide dissemination of works written in Latin, the common learned language of former times, created a remarkably homogeneous fund of knowledge in which the traditions of Western culture were formed.

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HESSEL E. YNTEMA is a member of the Board of Editors. This reproduces in substance the presidential address at the inaugural session of the Fifth International Congress of Comparative Law, held at Brussels under the auspices of the International Academy of Comparative Law, on August 4, 1958.

This was the source of the common law as a fundamental subsidiary body of principles of justice in the legal system, which, based on reason as well as authority, projected the claim of Rome to universal dominion, *imperio rationis tamquam ratione imperii*. This central body of legal doctrine was in reality created by the comparative studies of learned jurists, who assimilated the indigenous native customs and institutions with the basic Roman conceptions, as interpreted in the light of advancing legal science and adjusted to new needs—the *usus modernus* of the Continent and the Common Law of England. These two systems, so divergent in institutional techniques, yet so similar in their criteria of what is right, both were believed to incorporate a common universal system of justice, rationally ascertained and defined. As such, they provided an impersonal measure of conduct, private or public, in terms of individual rights and liberties.

In its progress, humanistic speculation and inquiry, greatly stimulated by the discovery of the New World, fundamentally altered the existing institutional ideological scheme, and in so doing created the Modern Era. We may remark two phases in this cultural transition, which has brought into being the world of change and crisis that we know today. These are, respectively, the dissolution of the medieval polity, integrated in the Holy Roman Empire, and the advent of modern science and technology. The progress of intelligence fostered by humanism not only stimulated scientific inquiry as the means to extend man's control over nature, but also led to examination of the institutions by which society was organized and controlled.

Inevitably, the Renaissance led to the Reformation. This struggle for national emancipation from the imperial power, embittered by religious controversy and persecution, effected the first significant breach in the medieval synthesis of imperial authority and universal justice. The unity of the Church was destroyed, and the consequent multiplicity of spiritual authorities weakened, if it did not invalidate, the supposition that there exists a universal system of justice, divinely ordained. Justice thus became a secular affair, which fell to the princes who ruled Europe.

At the same time, the emergence of a number of states in the contest with Rome broke up the unitary feudal structure of Medieval Christendom under the Pope and the Emperor, so that it was no longer possible to attribute universal justice to a common sceptre. Hence new doctrines were required to explain the phenomenon of law—within each state, between their rulers, and in the relations between their respective subjects. This division of mundane authority found its explanation in the doctrine of territorial sovereignty. This doctrine, elaborated by Bodin in 1576 to justify the independence that the kings of France had traditionally claimed from the pretensions of Rome, was

soon accepted as the fundamental postulate of the legal order—for municipal law in many works following Bodin's treatise, of which the *Leviathan* of Thomas Hobbes, which appeared in 1651, was especially notable, in international relations as formulated in 1625 in the celebrated work of Hugo Grotius, and in private international law as illustrated by the influential writings of Ulric Huber (*Institutionis Reipublicae Liber Singularis; De Jure Civitatis; Praelectiones Juris Civilis*) of the later 17th century. The doctrine of sovereignty ascribed the supreme power to the national sovereign and gave color to the claims of monarchs such as James I of England and Louis XIV, *le roi soleil* of France, to prerogative authority above the common law, subject only to God and conscience. It remained only for John Austin in the early 19th century, defining the province of law from that of morals, to draw the conclusion that law is positive, a sovereign command.

The common law tradition, however, was not at once nor even wholly displaced by this positivistic trend in legal thought induced by the logic of sovereignty. The division of authority among independent sovereigns, resulting from the conflicts of the period of the Reformation, precluded the derivation of the common law from a common power, secular or divine, but it left intact the humanistic reference to reason and nature as the essential source of law. It is significant that acceptance of the dogma of sovereignty was attended by a revolutionary development of natural law thinking, which accorded with both the Aristotelian attribution of government and law to the nature of man in society and the related Roman conception of a law of nature and of nations. It also conformed with the contemporary scientific doctrines; the appeal to nature challenged authority as the source of knowledge and sought a rational explanation of the world and the creatures by which it is inhabited, including man. Thus, scientific research gradually destroyed ancient superstitions regarding the constitution of the physical world, while natural law speculation concerning political and social institutions attacked vested privileges and dynastic claims to autocratic power. Proclaiming the native freedom and equality of human beings, reason sanctioned the principle of democracy as the basis of community existence. The law of nature, as conceived during the Age of Enlightenment, thus fed the flames of revolution, but at the same time, it continued and refined the common law tradition, stated in terms of individual rights. In effect, this was given official sanction by the codifications enacted in France and other Continental countries at the turn of the 19th century, which in substance embodied, with variations in detail, the common civil law. Having thus produced its fateful progeny—the reduction of universal justice to national codes and the more radical conception of the democratic rights of man—the labors of the era of natural law were accomplished, and the Restoration ensued, a pause in which time seemed to march backward.

But the idea of an international community of justice persisted, despite the apparent fragmentation of law on the Continent into national codes and the further division of authority in each separate state under constitutional government. On the one hand, the doctrine of territorial sovereignty, invented to substantiate the nationalistic pretensions of individual monarchs, was without difficulty adjusted to the democratic order; this required only that the State, an abstraction conceived as the popular sovereign, should replace the Crown. On the other hand, the notion that law is essentially national was scarcely admitted until the middle of the 19th century. Where not sterilized by formal exegesis, the study of the civil law, under the influence of the predominant historical school of Savigny, was centered in the scientific, historical and theoretical, investigation of the Romanist or Germanic sources of the common customary law, and not in the new codes in which it was declared. In England, there was no codification of the common law, which flexibly developed to meet new needs, absorbing extensive amendment by legislation without basic change in technique. In sum, a century ago, neither the principle of sovereignty, introduced by the Reformation, nor the constitutions and codes engendered by the democratic Revolution, had effectively challenged the idea of universal natural justice represented by the common law tradition.

Meanwhile, technological inventions, the humanist progeny of modern science, were changing the very conditions of existence. The Industrial Revolution differentiated the primitive family economy into a marvelously intricate and interdependent division of labor, which for its effective operation requires constant and increasing co-ordination. The production of the goods that modern living demands requires great factories, which aggregate great urban centers of population. The distribution of these goods wherever they may be needed is effected by constantly expanded and more expeditious means of commerce and communication. As technique becomes more efficient, the standard of living rises, and there is room for an ever-increasing number of people to perform the highly diversified services needed to manage all these functions of contemporary civilization. Meanwhile, social injustices appear, which must be rectified, and a variety of expedients are needed to give a measure of security in the midst of constant technological change. These characteristic features of the current scene have made individual liberty appear illusory without the guarantee of social and economic justice.

The Industrial Revolution has thus created the problem of the socialized sector—whether it is possible, and if so how, to service an integrated technological economy, politically controlled, without sacrificing the humanistic values for which our forebears fought—the

faith, the freedom, and even the existence as individuals of human beings who constitute society. This issue is the result of various aspects of the modern scene that must give us pause.

First, the ever-expanding demand for public services enlarges the bureaucratic apparatus needed to devise and administer the requisite directives.

Second, the individual, or a minority group, is in two new and vital respects at a disadvantage in relation to the official class: they control the public services on which existence itself depends; and they have a monopoly of nuclear and other horrendous weapons to suppress opposition, if it be necessary.

Third, under such conditions, an entrenched regime can hardly be challenged except by public discussion. This will be encouraged in a true democracy. But in varying degree assemblies and publications may be controlled, and new modes of telecommunication are available to wash the minds of men with propaganda in which truth is subordinated to policy and the symbols of communication acquire sinister meaning. In a totalitarian regime, if such means do not suffice, there are a variety of devices that an irresponsible secret police, the most hated phenomenon of tyranny, may employ to suppress heretical deviation, devices brutally calculated to silence the minds and souls of those who might dare to think.

Fourth, the most somber aspect is that the rulers of a modern state, possessing irresistible power, are encouraged to conceive that what authority prescribes is necessarily right and just. In such a state, the complex activities of modern society require an enormous stream of legislation to ensure constant and ubiquitous co-ordination of effort. The task of the jurist, who is called upon to read, digest, apply, or even to draft this vast volume of positive law, thus has become a veritable labor of Sisyphus. Under these conditions, it is not astonishing that law should be regarded as legislation, or that it should be attributed to the legislator by whom it is enacted, rather than to the infinitely complex social structure by which law is required. The tendency therefore is to simplify legal theory by differentiating law from the facts of life, by personalizing the legal process in terms of the agencies by which it is conducted, rather than as a function of the needs of human beings whom they are supposed to serve. Thus, legal positivism ignores whether laws are right; it denies the conception of the common law as a measure of justice.

These observations serve to highlight the mission of legal science today. In the history of comparative law, still to be written, the relative modernity of this branch of legal study will appear significant—the fact that the century or more during which it has been seriously cultivated fairly parallels the modern era of national codes and social legis-

lation. Undoubtedly, the immediate motive for comparative law frequently has been utilitarian. It is much easier to imitate a successful foreign model of legislation than to originate a new one. And in international practice as in private international law some knowledge of foreign legal systems is indispensable. But even such practical considerations reflect the perception that a particular system of law gives a partial view; that the essential principles of law transcend political frontiers; that legal science does not admit chauvinistic isolation. It imports the humanistic conception of universal justice, of a law of nature and of nations, which for centuries was expressed in the common law tradition. In perpetuating this tradition, the comparative study of law, through objective observation of historical phenomena, seeks to ascertain and to formulate in rational terms the common elements of human experience that relate to law and justice. Its proper province is mankind.

As such a discipline, what has comparative legal science to do in the contemporary world? One urgent task has been implicitly suggested. This is to ascertain under what conditions a technological economy can be developed consistently with legal order. In the first place, this will require comparative re-examination of the essential elements in the legal process, as conceived today; and secondly, an objective consideration of the conditions under which legality can be reconciled with the needs of social security and public service.

It would appear that, in the study of such issues, the comparison should be both in place and in time. On the one hand, it might be asked whether there shall be one law in Rome and another in Athens on such matters as publicity in the enactment and administration of law, access to independent, impartial tribunals to contest infringements of law, the right to counsel chosen from a vigilant bar, adjudication in conformity with general rules that have been duly advertised, and the like, in a modern system of justice. On the other, it should be of great interest to set the standards of judicial conduct that prevailed in England in the 17th century, as exemplified by the Star Chamber proceedings and even in the common law courts, alongside those prevalent in certain legal systems today. Or, to take an example of broader comparative scope, it would be most instructive to examine how in certain legal systems extensive nationalization of industry and commerce has been combined with a large degree of democratic liberty. Such inquiries would be relevant to the basic problem of legal order in a technologically advanced economy. Undoubtedly, they would show that a given legal system reflects from time to time the prevailing cultural environment and the extent to which this has been infused by humanism and democratic discipline. In culturally advanced communities, a deep and widespread sense of justice, a common law tradition,

will record such experience; in others, where humanism has not stirred the native intelligence of the people, the lag in culture will betray itself in relatively primitive notions of justice, discarded centuries before by more enlightened nations. A comparative demonstration of this order would be a major contribution to a world that bargains in terms of nuclear energy.

In conclusion, a second problem of special interest from the viewpoint of comparative law may be mentioned, namely, legal education. As I have suggested to my colleagues in America,[1] the common vocational conception that has dominated legal education in the United States for over a century presently concentrates legal instruction on positive law and the techniques of practice to a degree that has become a source of concern. As a result, it becomes each day more impossible within the allotted time to provide adequate technical training in terms of the increasingly specialized, voluminous, and changing mass of existing laws and regulations; on this assumption, the curriculum must be either narrowly specialized or progressively superficial. At the same time, while laws and regulations constantly change with the advance of scientific technology, the first function of a legal education is to prepare for a lifetime of service in the profession; it should provide insight and knowledge of enduring value.

Without purporting to characterize the systems of legal instruction in other countries, two general observations may be made. First, that the intensive attention given to voluminous detail and the practical bias of professional training, which dominate legal education in the United States, to the extent that like conditions are present in other countries, will have like effects. Second, that in the long run, the law that is taught, which fixes the minds of those who administer the respective legal systems, will have paramount influence in the development of legal science. For this, comparative legal instruction is indispensable, not merely to counteract the native provincialisms of local practice but even to provide the jurists of the future with adequate general preparation to meet the new technical problems of a changing world. Indeed, there is no greater service that comparative law today could offer than to inspire scientific advancement of the professional instruction in the different legal systems, not only more adequately and generally to promote mutual understanding among their advocates, but above all to instill in the profession devotion to the fundamental ideas of justice, as progressively refined in the spirit of humanism, by comparative legal science.

[1] For more detailed discussion, see the author's articles: "Comparative Legal Research. Some Remarks on 'Looking out of the Cave,'" 54 Mich. Law Review (1956) 899–928; "Comparative Legal Studies and the Mission of the American Law School," 17 La. Law Review (1957) 538–551.

FR. VINDING KRUSE

# What Does "Transfer of Property" Mean with Regard to Chattels? A Study in Comparative Law

When the man in the street hears that Mr. Allen has sold a chattel to Mr. Brown, this will seem to him a simple matter. And more or less consciously, he will think that this is an affair wholly left to the contracting parties A and B to determine; that no law—statute or otherwise—can interfere with the freedom of the citizens to make contracts. And if the man in the street reads in the statute about such contracts, e.g. the English Sale of Goods Act (1893, 56 and 57 Vict. c. 17), he will have this view confirmed.

Section 18, rule 1, of the Act tells us quite generally about contracts for the sale of specific goods:

> "Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed."

But the parties can determine otherwise, because section 18 begins by saying that rule 1 just quoted holds good "unless a different intention" (of the contracting parties) "appears," and that rule 1 is only a rule to ascertain the intention of the parties.

The French Civil Code (1803) includes the same rule in article 1583:

> *"Elle (i.e., la vente) est parfaite entre les parties, et propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé."*

The German Civil Code (1896, §§ 929–931) gives practically the same rule, although the wording is quite different; this is that transfer of property *cannot* take place as a result of mere agreement, but delivery (*Übergabe*) is required. However, *constitutum possessorium* is permitted; the creation only of a contractual relationship between buyer and seller enables the latter to continue possession on the buyer's behalf. But for that matter, the most colorless relation, e.g., the seller safekeeping the goods for the buyer, is regarded in German case law as a sufficient implicit agreement. As a result, in commercial life, the

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In large part, this paper reproduces lectures delivered at the Universities of Oxford and Munich.

right of property in most cases will be transferred as of the moment of the agreement with full protection of transfer.[1]

In the United States, the National Conference of Commissioners on Uniform State Laws in 1906 issued a Uniform Sales Act which by 1950 had been adopted in no less than 37 jurisdictions of the Union. This Act—with several alterations and additions—is incorporated in the Uniform Commercial Code 1952 (supplement 1955), drafted by the National Conference in co-operation with the American Law Institute. The Code has been adopted in Pennsylvania on the 6th of April, 1953, and later in Massachusetts and Kentucky. This draft (in the following cited as Uniform Commercial Code) also is based on the idea of freedom of contract with regard to transfer of property. Article 2, Part 4, Section 2–401 of the Code lays down the general rule that "title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties." But this American Act signifies in some important respects a considerable step forward compared with the European laws quoted, as shown below.

The three European acts (1803, 1893, and 1896) all belong to the 19th century; the American act to the beginning of the 20th century. In that period, liberalism in political economy and jurisprudence was the prevailing trend of thought, and this liberalism had great influence on contemporary legislation.

Adam Smith's liberalistic ideas, in his book, *The Wealth of Nations,* (1776) and among these that of freedom of contract, had been generally accepted in France even before the French Revolution and had influenced the great lawyers who drafted the civil code, the *Code Napoléon* (1803).

But even before the rise of economic liberalism, another school had prepared the way for the absolute freedom of contracts, (and influenced *i.a.,* the *Code Napoléon,* too) namely, the School of Natural Law of the 17th and 18th centuries. According to this School also, the contract alone determined the legal effects.

But is this liberalism and natural law, as expressed in the laws of the 19th century and the first years of the 20th century, this idea of freedom of contract that the contracting parties alone can determine what they like, true? Does this idea conform with the actual facts?

We must distinguish between: (1) the legal effects of the contract in the relationship *between the contracting parties;* and (2) the legal effects of the contract *in relation to third parties,* i.e. persons who are not present when the contract is made and who are not mentioned in the contract, but for whom the same contract may have grave legal consequences. Here is an invisible group on whose interests the contract may often have considerable economic effects.

[1] See Fr. Vinding Kruse, 2 Das Eigentumsrecht (Berlin u. Leipzig, 1935) 1514 *et seq.*

## I. Legal Effects Between the Contracting Parties

The legal effects are as a general rule determined by the contract. But there are several and important exceptions to this rule. In certain cases, one or both of the contracting parties will invoke the community, the authority of its laws, inviting the intervention of the law in their actual private contractual relations. Here I need only mention some essential cases to illustrate the law's interference even in these, as it seems, very private relations. Thus, if the contracting parties in the development of their contractual relationship later disagree on the interpretation of the terms of the contract or its underlying assumptions, or if one party maintains that he is not bound by the contract because of fraud or duress committed by the other, then the state, i.e., the law administered by the courts, must interfere, settle the conflict, decide the case.

But even outside these cases, the authority of the law must interfere, especially in cases where one party to the contract is the weaker party, e.g., in cases of undue influence and the like.

Last, but not least, the most fundamental rule on which the whole economic life of the modern community is founded is the rule of law which the state in all civilized countries through the courts compels the citizens to obey, namely the rule that all parties to valid contracts are required to keep every word of the contract which they have entered into. Even Adam Smith[2] admits that, without this state interference through the rule of law, the human community would have a fundamentally different structure from that of the community nowadays. The history of ancient law shows us that in the old primitive society this rule was unknown as a rule of law: it could no more be enforced by a superior authority than the treaties of states can be enforced, even in modern international law. The consequence of this lack of state protection of a promise or a contract in ancient society was that it became necessary—to secure the payment of the price for goods sold or a sum of money lent by one to another—to have the other party hand over a chattel or a piece of land under the condition that, if the money was not paid, the possessor was entitled to keep the chattel or land as his property forever. This delivery of an object as security for the price of goods or money due is the oldest germ of that legal form which today is known as pledge or mortgage. Pledge or mortgage was then originally a transfer of a conditional proprietary right; and in order that the seller or lender, as he could not rely on the promise of a contract, could get the physical power to compel the buyer and the borrower to pay the money, the first legal construction of a pledge or mortgage was that of a conveyance, a conditional transfer of the

[2] 1 The Wealth of Nations, Part 1.

property and the possession thereof. Adam Smith is quite aware that, if in the economic life of the modern community we could not rely upon contractual promises because we had no rule of law which alone could enforce them, economic life would have to fall back on such clumsy primitive forms of securing performance of contracts as those just mentioned and would be greatly checked and hampered in everyday business life.[3]

## II. Legal Effects of the Contract in Relation to Third Parties

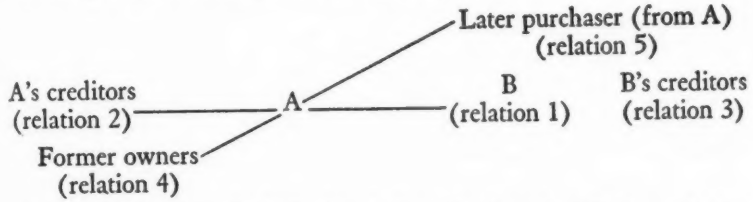
But still greater is the interference of the law in cases where the contract has effects on third parties. These third parties are essentially:

(a) Creditors of contracting parties. If either the seller, A, or the buyer, B—or both—go bankrupt, two other groups of persons interested in the same object will step in, namely, the *creditors* of A and B.[4]

(b) A person or persons to whom the seller later sells the same movable objects which he previously has sold to another. These persons may briefly be termed: *later purchasers from the seller.*

(c) If the object sold by A to B previously (prior to A's possession) has been owned by other persons, we can call these persons *former owners.*[5]

If we briefly describe the transfer of the property from A to B by a line between them A —— B, and their relations to other persons by lines from A and B, we can visualize the relations between these various groups of third parties in this way:




In the following I shall (as indicated above) call the relation A —— B: *relation 1,* the relation between B and A's creditors: *relation 2,* the relation between A (and his creditors) and B's creditors: *relation 3,* the relation between B and former owners, prior to A: *relation 4,* and the relation between B and later purchasers (from A): *relation 5.*

The problem here is: What does freedom of contract *inter partes* mean in relation to these groups of third parties, relations 2–5, who have an economic interest in this transfer? Does liberalism in economics

[3] See Fr. Vinding Kruse, 3 Das Eigentumsrecht, 1769 *et seq.*

[4] See Uniform Commercial Code, article 2, part 4, section 2–402: Rights of Seller's Creditors against Sold Goods; and part 5, section 2–502: Buyer's Right to Goods on Seller's Insolvency.

[5] Comp. Uniform Commercial Code, article 2, part 4, section 2–403.

and jurisprudence mean that A and B can quite freely by transfer dispose of the property concerned with binding legal effects on those groups, too?

In order to probe this problem to the bottom, we must, in my opinion, distinguish between two classes of rules of law which in continental jurisprudence are called: (1) declaratory rules, and (2) mandatory (preceptive) rules. (1) By declaratory legal rules, we understand rules which supplement the contract in points where the contract is silent; if the parties wish they can determine otherwise. (2) By mandatory (preceptive) rules, we understand legal rules which the parties cannot set aside in the contract and which the courts therefore must apply to the contract, even when it determines otherwise.

In the following we shall briefly use the contract of purchase, the relation between seller and buyer, as an illustrative example, but the same legal principles hold good of other transfers of personal property, e.g., when one leases a movable thing to another.

*Relation 1. Inter partes (seller and buyer)*

In the relation between the two contracting parties, many of the legal rules are only "declaratory"; this is quite natural, for in this relation the intention of the parties is in most cases the deciding factor. But it is not always clear when the rules of the Sale of Goods Act and of the French Code are only "declaratory" and when they are mandatory; the reason is that the legislator under the influence of liberalism has not been fully aware of the important distinction between "declaratory" and "mandatory" rules.

Section 18 of the English Sale of Goods Act seems (1) to be only "declaratory" (see the words: "Unless a different intention appears") and (2) to be concerned only with the relation between the parties. The heading of Part II of the Act also leads to the same conclusion (see the words: "Effects of the Contracts . . . as between Seller and Buyer"); the introductory words of section 18 convey the same impression, as rules 1–5 of this section are said to be only rules for "ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer."

In reality, however, the actual facts do not correspond to this description in the Sale of Goods Act. Section 18, in rule 5, deals with the sale of unascertained or future goods by description and provides that the property in such goods passes from the seller to the buyer when the goods in a deliverable state are unconditionally *appropriated* (italics by author) to the contract, whether by the seller with the assent of the buyer, or by the buyer with the assent of the seller. As this rule, according to the introductory words of section 18, is only "declaratory," one would think that the seller and buyer were free to determine that the

property in such goods can also pass to the buyer before the appropriation (or "individualization" in the language of continental jurisprudence). But if we look at the words of section 16, no property passes to the buyer before the appropriation, and as section 16 does not have section 18's introductory words about the intention of the parties as the all-deciding factor, it seems as if section 16 in connection with section 17 is mandatory and therefore curtails the freedom of contract under section 18, rule 5.

On the other hand, section 16 is placed in Part II, which deals only with the transfer of property between the seller and buyer; in this relation no reason whatever can be given for restricting the freedom of the parties to determine that the property in the goods shall pass at a time before appropriation. Thus, if the seller has in his warehouse 500 tons of coal, of which he contracts to give the buyer the right to 300 tons, the parties may freely agree that the buyer obtains this right immediately, e.g., on December 15 before the purchase is earmarked, or, in other words, that at any time after December 15, the buyer can have the 300 tons identified and sent to him. In this relation, Relation 1, a conclusion *e contrario* from section 18, rule 5, therefore holds good, and section 16 cannot interfere with this relation at all. A mandatory rule therefore can only be based on section 16 if this section in reality deals with another relation than the relation between seller and buyer, i.e., a relation to a third party. But who is the third party? What group of third parties did the legislator have in mind when he formulated this mandatory rule in section 16?

The ambiguity of the Sale of Goods Act on this essential point can only be dissolved if we look at another Act of Parliament, namely, the Bankruptcy Act of 1914 (4 & 5 Geo. 5 c. 59), because according to this Act all property which at the commencement of the bankruptcy belongs to the debtor passes over to his creditors from that moment; this legal rule in connection with the Sale of Goods Act, section 16, must therefore mean that if the goods are not ascertained before the commencement of the bankruptcy the property cannot pass to the buyer. This is simply prohibited by law. Goods which are not ascertained before that moment belong to the creditors of the seller. The contract between A and B then has no legal effect in relation to these creditors (Relation 2).

It is, therefore, not correct to place section 16 in a part whose heading tells us that the following sections treat "Effects of the Contract" regarding "Transfer of Property as between the Seller and Buyer." It is quite immaterial whether the parties have a "different intention" and have contracted that the property in unascertained or future goods is to pass before appropriation (or individualization); the transfer of the property to the buyer in their contract has no legal effect at all on

the creditors of the seller if the appropriation has not taken place before the commencement of the bankruptcy.

The Sale of Goods Act therefore ought: (1) to have distinguished quite clearly between "mandatory" and "declaratory" rules; and (2) between the relation *inter partes* (seller and buyer) and the relation to third parties; and (3) in sections 16, 17, and 18 to have stated that the mandatory rule of ascertaining the goods applies to the relation between the parties to the contract on the one hand and the creditors of the seller, above called Relation 2, on the other hand. The ambiguity of the Sale of Goods Act on these points is presumably connected with the legislator's being unconsciously influenced by the liberalism which was the prevailing trend of thought in the 19th century.

Compared with the Sale of Goods Act, the United States Uniform Commercial Code (article 2 part 4—Title, Creditors and Good Faith Purchasers—sections 2-401 and 501)—which uses the word identification instead of the English appropriation—is much clearer. It provides quite generally: "Title to goods cannot pass under a contract for sale prior to their identification to the contract." It is evident that this section gives a mandatory rule; see also the following words in this section: "Subject to this provision," etc. Freedom of contract is restricted by this important rule of law.

*Relation 2. Between the parties (A and B) and the creditors of A*

The reasons for the mandatory rule protecting the creditors of the seller are obvious. As long as the objects belonging to a debtor are generic, i.e., are placed in his warehouse as a not ascertained part of a stock of coal, grain, etc., and the seller has made other contracts of sale concerning several other lots of this coal, grain, etc., but no lot has been identified or ascertained as belonging to buyer A or B or others, all these buyers have a just claim to be treated equally. If the mass of unidentified goods is not sufficient to satisfy them all in accordance with their contracts, they can, of course, in case of the seller's bankruptcy, get only a fraction of the mass each in proportion to the quantities stipulated in their different contracts, just as various claims to the debtor's money are only satisfied by similar dividend payments; if the bankrupt debtor owns both goods, e.g. coal, grain, and money, all buyers and other creditors must divide the whole property of the debtor equally in proportion to the respective quantities of coal, grain, money, etc., stipulated in their various contracts.

The law must here imperatively fix a distinct point of intersection deciding at what factual stage a buyer of goods passes over from the weak dividend position to the strong position of property in certain objects, protected against all the creditors of the seller. And this point of

intersection the law generally in all civilized countries has found in the act of ascertaining or identifying or individualizing certain goods to the fulfillment of a contract of sale. We can call this legal principle, indispensable to all modern economic life, the mandatory *principle of the legal equality of all creditors.*[6]

(a) But the problem now is: What facts are required to establish this legally important act of ascertaining or identification? In the relation between seller and buyer, the English Sale of Goods Act section 18, rule 5, when the contract itself does not determine at which moment the property passes to the buyer, gives a "declaratory" interpretation of their intention to the effect that the property passes to the buyer when certain objects described in the contract are unconditionally appropriated (identified) in a deliverable state to the contract "either by the seller with the assent of the buyer, or by the buyer with assent of the seller." A one-sided appropriation—identification—of a distinct quantity of goods, e.g., the seller's separation of 20 tons of coal from a larger amount of coal and his laying them aside for delivery, therefore according to English law, does not seem sufficient to transfer the property to the buyer; for establishing this transfer, the said "assent" is further required, here by the buyer. But what does this requirement, "assent," in reality mean? In my opinion, nothing. As section 18, rule 5, itself does not require an express but only an "implied" assent, and even provides that this implied assent may be given either before or after the appropriation or identification is made, this seems to be only the kind of fiction which is often found in earlier laws.

The fact that in practical business life there is no reality in this requirement of "assent" may be seen in *Aldridge v. Johnson* (1857)[7] and *Rhode v. Thwaites* (1827).[8] Whether the sacks into which a lot of grain is poured belong to the buyer or to the seller and whether the buyer has inspected the grain or not seem quite immaterial. Whether a buyer promises to fetch the goods himself or allows the seller to send them seems immaterial, too. What sacks are used in the particular cases—the seller's or the buyer's—is only a question of expediency; whether a buyer inspects the goods or not is a question of confidence. After many years' experience, the buyer has confidence in the seller, and whether the seller or the buyer handles the dispatch is only a question of what is more expedient in the actual situation. One cannot see

[6] There are some exceptions to this legal principle, e.g., creditors who have a mortgage on the property of the debtor; but even the exceptions to this principle in the English and some continental laws are strictly bound by mandatory rules governing the conditions under which such a privilege of some creditors can be enforced, especially that of registration. Without fulfilling the mandatory rules of registration of mortgage rights, the said creditors, the mortgagees, can get no protection of their contract in relation to third parties, especially against other creditors of the mortgagor and bona fide purchasers.

[7] 26 L.J.Q.B. 296, 7 E & B, 110 R.R. 875.

[8] 5 L.J.K.B. 163, 6 B & C, 30 R.R. 363.

that there is any possible connection between the intention of the parties to transfer the property and such accidental acts as whether the buyer or the seller packs the goods, the buyer or the seller arranges transport, the goods are seen or not seen by the buyer, etc.

Even between the parties to the contract, this curious "interpretation" of their "intention" to transfer or not to transfer the property by means of an "assent" seems unnecessary. And in the relation between the buyer and the seller's creditors, Relation 2, the construction of an "assent" becomes so easy that these creditors will seek in vain for protection in this requirement: when a seller before the bankruptcy has individualized—identified—a certain quantity of goods of a generic description and laid them aside for the buyer B, B will always be able to maintain that this individualization or identification is, of course, exactly in accordance with his "implied assent," in this case "after the appropriation is made"; and this is all that the law, section 18, rule 5, requires.

In French law, too, this element of "implied assent" has had a certain influence on the decisions of the courts, but with no better results than in English law.[9]

The American Uniform Commercial Code therefore is quite right in omitting these dubious words "implied assent," etc. This Code, in section 2–501, expressly states that the conditions of a contract of sale shall be *"explicitly* (italics by author) agreed on by the parties," if the intention of the seller and buyer is that the property in the goods shall not pass at the identification of the goods.

In a new sale of goods act and in the new French civil code which is now under consideration, it would not do any harm if the words of section 18 rule 5: "assent, express or implied," "before or after the appropriation," and similar expressions in French law were left out. These words, as stated above, in practice lead only to fictions and uncertain decisions. The words of the Uniform Commercial Code should here be preferred.

(b) There are, however, other mandatory rules of law than the Sale of Goods Act, section 18, rule 5, which also protect the creditors of the seller against the transaction between the seller A and the buyer B. An essential rule is found in section 38 of the English Bankruptcy Act, the so-called "reputed ownership rule." This rule is peculiar to English law; there is no similar rule in continental European law. The interpretation of this English rule has raised many difficult questions in judicial practice.[10] This rule, too, might perhaps be left out in a reform of the Bankruptcy Act. Another rule for protecting the seller's creditors, namely, the Sale of Goods Act, section 4 (the old Statute of

[9] See my book: 2 The Right of Property (1953) 247–248.

[10] See Williams, Principles of the Law of Personal Property, pp. 111–114.

Frauds, 29 Charles II c. 3) has already been replaced by a new statute (2 & 3 Eliz. II, Ch. 34, 1954).

(c) The Bills of Sale Acts, 1878 and 1882 (41 & 42 Vict. c. 31 and 45 & 46 Vict. c. 43), also protect the seller's creditors against transactions intended to give security in the form of a mortgage without depossession. Williams characterizes these rules of the Bills of Sales Act as "exceedingly complicated and difficult to understand."[11] In the Danish Registration Act 1927, we have a very simple system of registration covering such transactions.

(d) Last, the English Bankruptcy Act and the corresponding continental laws and the Uniform Commercial Code (art. 2, part 4, section 2–402) emphatically declare illegal and void any agreements made with intent to defraud creditors regardless of the form or time of distraint or bankruptcy.

*Relation 3. Between A (and his creditors) and B's creditors*

Classic Roman law required for the validity of transfer of property in all relations *traditio*—physical handing over of the object sold—and this meant in this Relation 3 that every transfer of property from A to B was conditional on payment; there was therefore no purchase on credit.[12] But in the latest Roman law and in commercial law governing trade between towns in the Middle Ages and the Renaissance period, sales on credit were acknowledged; the unpaid seller's right was gradually restricted, at last to goods which were not delivered, i.e., physically handed over to the buyer before his bankruptcy was declared.

England in the 16th, 17th, and 18th centuries held the dominating position in the commercial life of the world. This right, called right of stoppage *in transitu* was therefore gradually acknowledged in the laws of most European countries. Now the English Sale of Goods Act, section 44 (*cf.* section 45–47) provides:

> ". . . when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price."

On the continent, the law later on went even further: the French *Code de Commerce* (articles 576–78), the German Bankruptcy Act (§ 44), and the Uniform Scandinavian Sale of Goods Act (§ 41) enact that the seller can recover the goods even when the goods are delivered to the estate of the bankrupt after bankruptcy has been declared.

[11] *Op. cit.*, 96.

[12] See P. F. Girard: Manuel élémentaire de Droit Romain, 8th edition, p. 319; G. Cornil: Droit Romain, p. 198. On different views, see *i.a.* W. W. Buckland: A Text-Book of Roman Law, 2d edition, p. 230–231 with references.

*Relation 4. Between B (the buyer) and former owners, prior to A (the seller)*

Roman law in this relation gave the former owner a general right of recovery (*vindicatio*), i.e., an absolute right to recover the goods from B and later purchasers. During the later economic development in Europe, the needs of commercial life went against this general right of recovery.

The French Civil Code in article 2279 laid down a sweeping rule against the right of recovery as follows: *"En fait de meubles, la possession vaut titre,"* according to which whoever in good faith acquires a chattel from its possessor and receives delivery, is protected against the owner's right of recovery. The German Civil Code (§§ 932–934) lays down as a general rule that anyone who through a bona fide agreement acquires a thing and has it delivered to him becomes the owner and thus is not subject to the original owner's right of recovery.

The English Sale of Goods Act gives first a special and very limited rule in section 22:

> "Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller."[13]

But then there is a general rule in the Sale of Goods Act (sections 24, 25, and 26) that even if the seller's title (from his conveyor) is contested (whether on grounds of fraud, wrong assumption, undue influence, etc.), the bona fide buyer acquires a valid right of ownership and thus is not subject to the original owner's right of recovery.

And the Uniform Commercial Code (Article 2, Part 4, section 2–403) generally protects a bona fide buyer "in ordinary course of business."

There is only one exception—in French, German, and English law, and (so far as I understand) also in the Uniform Commercial Code—and that is the rule laid down in section 24 of the English Sale of Goods Act, Part One:

> "Where the goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them whether by sale in market or otherwise."

The same exception is admitted in the French Civil Code article 2279 and the German Civil Code, § 935.

[13] The exception of market overt is a very limited one; it applies only to sales in the City of London and (in the provinces) in those places established as markets by charter or prescription, i.e., the market places of the towns; it does not cover ordinary shops except in the City of London.

The same rule must, of course, apply to the relation between A and later purchasers (from B).

*Relation 5. Between later purchasers (from A) and B*

The French Civil Code (article 1141) provides that when a person has sold the same chattel to two different people, the buyer who in good faith has taken possession gets the preference, even though his agreement with the seller is later than the other's. This provision is only a single application of the wider rule just mentioned, in article 2279. Much the same rule is laid down in the Sale of Goods Act, section 25.

In the primitive community and its law, the transfer of property from one person to another was a very simple, uncomplicated act between seller and buyer, who were both present. The seller handed his chattel (e.g., a weapon, a cart, a cow) to the buyer, and at the same moment the buyer handed the payment to the seller. In very early times before payment in the shape of money was invented, the whole transfer was a barter where the two parties handed over to each other two different chattels—e.g., a weapon for a cow. From this old community arises the ancient Roman and other primitive law which for a valid transfer requires *traditio* or physical delivery of the chattel.

But in the course of the great economic development and the ever-increasing trade and interchange of goods between persons or associations in the same or in different countries, transfer of goods has become, especially in the commercial life of modern times, a very complicated transaction, a whole process in which the interchange of values between the parties passes off at different stages; the law then finds it just and expedient more and more to attach *different legal effects to the different actual stages or facts of the process of transfer.* As shown below, we must distinguish between the following stages or facts:

(a) The *contract* between the two parties.
(b) The *ascertaining* or *identification* of goods not specific.
(c) The *delivery* (physical handing over, *traditio*) of the goods to the buyer, before or after the commencement of his bankruptcy.
(d) The buyer's *payment* of the price for the goods.
(e) The buyer's *good faith.*

The differentiation of the various stages of transfer and of various legal effects and attaching of these effects to the different stages has become more and more necessary in modern commercial law in order to deal justly and expediently with the interests of the different groups of third persons, other than the parties to the contract.

And while the rules of law governing the legal effects of the transfer may to a large extent be "declaratory" so far as only the parties to the

contract (the seller and the buyer) are concerned, it has become necessary for the law to set up mandatory rules on the legal effects of the contract with respect to the various groups of third persons.

In modern times, experience, however, has proved it necessary for the state in some spheres of economic life to interfere even more directly with the transfer of property than by these mandatory rules, namely, by provisions to make some forms of transfer publicly known through a register kept by officials, also in the interest of the above-mentioned third parties. Some lenders of money will try to conceal, in the form of ordinary business transfers, their lending transactions from third parties, especially from the persons who as creditors of the borrower are interested in his goods and want to prevent his being deprived of his goods in the case of distress or bankruptcy. With regard to real property the state interferes in many countries by the well-known system of registration of titles and mortgages. But even with regard to that part of personal property which we call chattels, a transfer that is not within a certain time followed by delivery of possession of the chattels, must in England and the Scandinavian countries be registered in accordance with the English Bills of Sale Act 1882 and the much older corresponding Scandinavian Acts of 1841 (Danish) and 1845 (Swedish). Here the *purpose* of the transaction is the deciding factor whether it shall be entered in the public register or not. If the purpose of the transaction is actually a loan of money, although it is concealed as an ordinary sale of goods, the transaction must be entered in the public register. But if the purpose is a "transfer of goods in the ordinary course of business of any trade or calling," according to the Bills of Sale Act 1882, section 4, the transaction does not require registration and holds good against the creditors in the case of the seller's distress or bankruptcy, even when the buyer has not had delivery or possession. Experience shows generally that it has not been difficult for the courts to decide whether the transaction is a loyal ordinary business sale of goods or whether the purpose of the so-called transfer without delivery of possession is to conceal a lender's security for a loan.

Besides the above-named five stages or factors (a-e) there is thus in modern times in many countries a sixth: *registration,* i.e., publication by entering the transfer in a register kept by the state and its officials. Registration is legally necessary to give a transfer which is in reality a loan transaction protection against the other creditors of the borrower (the "seller") and future buyers of the chattels. Both these groups of third parties are informed of these transactions through the public register.

The results of the foregoing may be summed up as follows:

(1) Between *the two parties,* A and B, *in casu* seller and buyer, the legal effects to a great extent depend on the contract—stage a. But as

shown above, even in this relation, the law interferes by mandatory rules and often cancels a contract or parts of it, in order to protect the weaker party to the contract and altogether to do justice as far as possible (protection from compulsion, undue influence, etc.). Above all, as pointed out, above, we must remember the fundamental rule of law which alone can give economic life order and security, namely, the rule that every party to a contract can be compelled by the courts to keep his word, i.e., all the promises which in the contract he has given to the other party.

With regard to *third parties* the following legal effects attach to the various actual stages of the process of transfer:

(2) In the relation between *the creditors of the seller A and the buyer B,* the ascertaining (*identification*)—stage b—is the deciding stage or fact which gives the buyer protection against the seller's creditors (in case of distress and bankruptcy of the seller).

(3) In the relation between *the seller* (and his creditors) *and the buyer's creditors,* delivery—stage c—(the physical handing over, *traditio* in early Roman law) is the factor or stage which ought to decide whether the seller (or his creditors) can withdraw the goods on the way to the buyer (or delivered after his bankruptcy) or not. If the goods have not yet been handed over to the buyer before the commencement of his bankruptcy, the seller according to English and continental law can take them back, and according to most continental laws, the seller can even withdraw the goods if the goods do not arrive at the buyer's place until after the commencement of his bankruptcy.

(4) In the relation between the *buyer* (and his successors) and *former owners* of the goods, the *delivery* (physical handing over) to the buyer and his *good faith* in the delivery—stages c and e—give him protection against all former owners of the goods sold.

(5) In the relation between *two persons to whom the seller has sold the same goods,* the same factors as under 4—delivery to one of these buyers and his good faith in the delivery—decide that he is protected against the other buyers. The buyer's payment of the price—stage d—has the effect that after this payment the seller (and his creditors) can no longer withdraw the goods sold from the buyer (or his creditors or his successors by sale). The limitation in the Uniform Commercial Code, article 2, Part 5, section 2–502 of the buyer's right to cases where "the seller becomes insolvent within 10 days after receipt of the first installment on their price" has no parallel in European law.

It is not astonishing that early Roman law and other ancient law laid so much stress upon *traditio*—in the sense of physical delivery of the object sold—for, as shown above, even in modern commercial law this *traditio* still has a considerable legal effect, namely, in the above-

mentioned relations 3, 4, and 5—but in 4 and 5 in connection with another factor: good faith. But the law committees and the legislatures that have drafted the laws of the modern communities in this sphere have not had a clear or full general view of the importance of *traditio* in the different relations (1–5). The provisions have been scattered among various statutes (sale of goods acts, bankruptcy acts, bills of sale acts, etc.), and in some of these statutes, it is not clear which rules are "declaratory" and which are "mandatory."

The concept of transfer of property is a very comprehensive and complicated one. We must remember the deep wisdom of the early Roman sentences: *distinguendum est,* and *divide et impera.* This last sentence is not only often true in politics, but in many cases in scientific matters too, especially in jurisprudence. By distinguishing one often acquires power over human life. In the life of law we can very often only obtain the power to do justice towards the various groups of people through distinguishing between different legal effects and different factors to which the effects can be attached.

Through the analysis given above of the process of transfer of property, I have tried to make a contribution to an investigation which perhaps might give us more power over, and the faculty of forming, the just provisions of law to deal with the conflicting interests which arise during the transfer of property: the interests of the contracting parties, of their creditors, of former owners and later purchasers of the goods. People, even lawyers, often unconsciously use words in different senses, and the result is confusion, which often gives the courts much subsequent trouble and work in the interpretation of contracts and the application of statutes. Therefore, both the lawyers who draft a contract of sale and the lawyers who draft an act concerning the same matter ought first of all to ask themselves: what do I mean in the particular context by the term "transfer of property?" And the law committees must ask: Is the rule laid down in a provision of the statute we are drafting a "declaratory" or a "mandatory" rule? Neither the law committees nor the law courts nor the legal advisers of businessmen can deal properly with the subject of transfer of goods unless they realize that it is absolutely necessary to make quite clear to the citizens what legal effects and what groups they have in mind when they use the expression "transfer" of goods in the rules that they are establishing or handling.

Secondly, the law committees must never in drafting rules of law let themselves be influenced by abstract political slogans or catchwords such as "freedom of contract" or the contrary "intervention of the state." In the 19th and 20th centuries, not only the politicians in many acts of parliament but even professional lawyers in drafting many statutory provisions have been influenced by the abstract principles of liberalism, socialism, or other social theories. As shown above, a realis-

tic lawyer must in the future when forming rules of law put aside once and for all all these abstract social theories and build only upon the practical experience of life. As we have seen, a liberalistic view, e.g., freedom of contract, may then prove itself useful and just in one sphere of life with regard to special legal effects, but without any value and quite unpractical in another sphere of life and with regard to other legal rules. On the other hand, a socialistic view, i.e., the intervention of the state, may be just and expedient in one field of law and with regard to some legal effects, but useless or detrimental in many other spheres of life. There have been such experiences in many social questions, but the social philosophers, both Karl Marx and Henry George, and to some extent Adam Smith, though especially his liberalistic followers, generalize the experiences from one very limited sphere of the community's life and apply them to another, even though this method of generalization proves quite unscientific. Above, we have seen that this method has proved false in one important sphere of the economic life of the community, namely the transfer of goods. When we investigate this or another field of economic life without any prejudice, without any preconceived idea, and listen only to the practical experiences of life, we shall get expedient rules of law and a differentiation of groups of people and legal effects which spells justice.

ATHANASSIOS N. YIANNOPOULOS

# Bills of Lading and the Conflict of Laws: Validity of "Negligence" Clauses in France

## Introduction

Judicial practice and legislative enactments in pursuit of a "national" maritime policy during the 18th and 19th centuries displaced in various countries a venerable uniform "law of the sea" and gave rise to a sharp conflict of laws.[1] Already by the end of the past century, divergencies in the regulation of the carriers' liability under contracts of affreightment evidenced by bills of lading had attracted attention and had caused concern. The most spectacular conflict in that regard involved the validity of "negligence" clauses, namely clauses designed to exonerate the carrier from liability for his or his servants' negligence in connection with damage to the cargo.[2]

In countries where cargo interests dominated, "negligence" clauses were declared invalid; in other countries, where hull interests prevailed, such clauses were given effect under the cover of an almost unlimited freedom of contracting.[3] In addition, the domestic policy favoring the shipper or the carrier was frequently carried into the international field by the adoption of conflicts rules safeguarding the application of domestic standards to bills of lading involving significant international contacts.[4] Thus, due to varying domestic standards

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[1] See, for more detailed discussion, Yiannopoulos, "Conflicts Problems in International Bills of Lading: Validity of "Negligence" Clauses," 18 La. L. Rev. (1958) 609. See also Ernst Rabel, 3 Conflict of Laws: A Comparative Study (1950) 231 ff.; Berlingieri, Verso l'Unificazione del Diritto del Mare, 2nd ser., (1933) 20.

[2] See Yiannopoulos, *supra,* note 1 at 610. See also, Knauth, The American Law of Ocean Bills of Lading (1953) (hereinafter Knauth) 116, 119, 120, 138; Stoedter, Geschichte der Konnossementsklauseln (1954) 20 ff.

[3] See Cole, The Carriage of Goods by Sea Act (1937) 11; Scapel, La Nouvelle Législation sur les Transports des Marchandises par Mer (1936) (hereinafter Scapel) 14; Sauvage, La Législation Nouvelle sur les Transports Maritimes des Marchandises (1937) (hereinafter Sauvage) 1; Auburn, Les Transports des Marchandises par Mer (1938) (hereinafter Auburn) 3; Knauth, 119.

[4] See Ripert, 1 Droit Maritime (1952) (hereinafter Ripert) 255; Plaisant, Les Règles de Conflit des Lois dans les Traités (1945) (hereinafter Plaisant) 3. Where the doctrine of freedom of contracting prevailed, as in France and England, the parties were given option to select the applicable law; where limitations were imposed on the carrier's freedom to exonerate himself from liability for negligence, as in the United States, the

and conflicts rules, a negligence clause inserted into an international bill of lading could be valid in one country and invalid in another, and the liability of the carrier could differ with the fortuitous or selected forum. As a result, an untenable situation was created: security in international transactions was minimized, the negotiability of bills of lading was imperilled, and world trade was seriously hampered.[5]

The United States having first succeeded in reaching a compromise between the conflicting interests of carriers and shippers in its Harter Act, 1893, took the lead in urging a uniform international regulation of the carriers' liabilities. The need for such regulation was generally felt, and action was taken by interested business groups and international organizations such as the International Law Association and the Conference on Maritime Law. After several decades of preparatory work and back-stage negotiations, the International Law Association in its Hague Meeting of 1921, agreed on a body of rules known as "Hague Rules, 1921."[6] These rules, originally intended to be incorporated to bills of lading by agreement, were later recommended as a basis of domestic legislation by the Diplomatic Conference on Maritime Law (Brussels, October 1922). The rules were amended the following year by a committee appointed by the Conference, and finally, the movement for uniformity culminated in a Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed in Brussels, on August 25, 1924.[7]

The Brussels Convention is neither a complete code of affreightment, nor does it purport to regulate all maritime transportation; it simply intends to unify "certain rules" relating to bills of lading, and only with regard to damages occuring between the time of loading and discharge to hull cargo other than live animals.[8] Its purpose was by compromis-

forum law was declared applicable as a matter of law to all contracts concluded or performed within the jurisdiction. See Yiannopoulos, Conflicts Problems in International Bills of Lading: Validity of "Negligence" Clauses, 18 La. L. Rev. 609 (1958); Sauvage, Manuel Pratique du Transport des Marchandises par Mer (1955) (hereinafter Sauvage, Manuel Pratique) 7; Marais, Les Transports Internationaux des Marchandises par Mer et la Jurisprudence en Droit Comparé (1949) (hereinafter Marais, Les Transports Internationaux) 5; Colinvaux, The Carriage of Goods by Sea Act 1 (1954); Graveson, Bills of Lading and the Unification of Maritime Law in the English Courts, in Conflict of Laws and International Contracts 64 (1949).

[5] See also Knauth, 120; Astle, Shipowners' Cargo Liabilities and Immunities (1951) 7; 2 Ripert 847.

[6] See 30th Report, II 254–256. On the history of the movement for unification, see Bill of Lading Clauses and the International Convention of Brussels (hereinafter Dor) (1956); Stoedter, *op. cit. supra* note 2; Dor 13 ff.; Auburn 18 ff.; Marais, La Loi du 2 Avril 1936, relative au Transport des Marchandises par Mer (1937) (hereinafter Marais) 13 ff.; 2 Ripert 255; Scrutton, Charterparties 453 (1955); Carver, Carriage of Goods by Sea 154 (1952); Ripert, La Conférence Diplomatique de Bruxelles, 2 Rev. Dor 49 (1923); Law Commission de Bruxelles, 4 Rev. Dor 44 (1923); Knauth 115 ff.

[7] See League of Nations, Treaty Series 17 (1931).

[8] See Knauth 137; Zueger, Die Haager Regeln über Konnossemente und das rechtliche Schicksal der Ware während des Seetransportes 13 (1953); Diena, Principes du

ing the conflicting policies of the maritime nations and balancing the interests of shippers and carriers, to standardize on the international level the liabilities incurred by the carriers under contracts of affreightment evidenced by bills of lading.[9] And it was expected that as to matters regulated by the Convention, the result of a possible litigation would be the same in the courts of any of the contracting states.[10]

Unfortunately, even the reserved optimism which prevailed at the time the Convention was signed, proved to be illusory. The very text of the Convention, as finally adopted, left the door open for subsequent deviations to the prejudice of the desired uniformity.[11] Soon it became clear that even if all nations had formally adhered to the Convention, conflicts with regard to the carriers' liability would not have been eliminated.[12] But the hope for uniformity of result became even more remote as several nations refrained from signing, ratifying, or adhering to the Convention,[13] and others which became parties to that agreement failed, as a rule, to comply with it in all respects.[14] Indeed, conflicts between texts incorporating the uniform rules into the several legal systems are not infrequent; and moreover, the area of application of the (uniform) forum law as well as choice of law rules applicable to bills

Droit International Privé Maritime, 51 A.D.I.R.C. 409, 414 (1935); Convention, Art. 1 (b) (c) (e).

[9] See Knauth 136, "The drafting . . . represented compromises and concessions"; Scapel 108; Auburn 32, 135; Marais, Les Transports Internationaux 19; Stangard, The Internationality of Shipping 11 (1940); Exposé des Motifs du Projet de la Loi, Chambre, Annex No. 3255 p. 996 ". . . it was a kind of a peace-treaty." The compromise exists in the idea that the carrier is unable to exonerate himself from liability for negligence other than in the navigation or management of the vessel, while he is released from the absolute warranty of seaworthiness. Charter-parties are excluded from the uniform regulation since, unlike the bill of lading situation, the parties to a charter-party agreement stand on equal ground. Moreover, while bills of lading are negotiable instruments, charter-parties are non-negotiable and the need for uniformity is not pressing. *Cf.* Scapel 20; Sauvage 10; Graveson, *supra* note 4 at 59.

[10] See Knauth 136; Dor 12.

[11] See Stoedter, Zur Statutenkollision im Seefrachtvertrag, in Liber Amicorum of Congratulations to Algot Bagge 220, 225 (1955).

[12] *Cf.* Diena, *supra* note 8 at 414. Conflicts may effectively be avoided only by unification, and universal adoption, of an entire branch of law. And even in that case conflicts problems may arise, unless the uniform law is interpreted uniformly in all countries. See 1 Ripert 73; Bonnecase, Le Droit Commercial Maritime 374 (1931); Stoedter, *op. cit. supra* note 2 at 96. See also International Law Association, 30th Report II, p. 42 (1922); Joint Parliamentary Committee, Report 130 (1930). The Brussels Convention has not eliminated conflicts: it unified only "certain rules" applicable to a fraction of the entire contract of affreightment; and these unified rules have been interpreted in a most ununiform way.

[13] According to an estimate four fifths of the world tonnage is under flags which adhere to the Brussels Convention. See Stoedter, *supra* note 11 at 220. Most of the maritime nations have formally adhered to the Brussels Convention; others, without adhering have enacted domestic legislation incorporating the rules agreed upon in Brussels. See list, Knauth 453; Colinvaux, *op. cit. supra* note 4 at 153, 182.

[14] See Knauth 147; Comment, Ocean Bills of Lading and some Problems of Conflict of Laws, 58 Col. L. Rev. (1958) 212; The St. Joseph, [1933] P. 119, 134 "The nations have not adopted a uniform system of applying the Hague Rules. Most nations have

of lading differ from country to country.[15] These divergencies in domestic legislation to the extent that they persist, and conflict of choice of law rules, result in confusion and uncertainty. Depending on the place of litigation, the same bill of lading may or may not be subject to the Brussels Convention, even where the forum is in a signatory country and the bill of lading involves contacts with another signatory country.[16] And, as in the past, a negligence clause may be given effect in one country and denied effect in another, contrary to both the spirit and letter of the Brussels Convention.

In a series of papers, I tried to ascertain the law applied by American, English, and German courts[17] in the determination of the validity of bills of lading clauses aiming at relieving the carrier from liability for negligence, whether directly, or indirectly by providing for the application of foreign law and for the settlement of disputes in foreign courts. It is the purpose of this paper to ascertain the law applied by French courts in the determination of the validity of similar clauses inserted into international bills of lading. A historical survey of the French legislation, a brief analysis of its provisions, and the definition of its area of application, will precede the discussion of the validity of exoneration clauses inserted in bills of lading covered by the uniform rules (as incorporated in France) and in bills of lading outside the scope of these rules.

## I. From the Commercial Code to the Brussels Convention

### *1. The Commercial Code*

In France, until as late as 1936, the contract of affreightment was regulated by the second book of the Commercial Code, whose relevant provisions were considered "directory," namely applicable in absence of contrary agreement and in so far as that was compatible with the express or implied intention of the parties. As a result, the contract was in almost all cases governed by elaborate clauses which the shipping

not embodied them in their law at all, others differ in the way they have adopted them. . . . It is somewhat alarming to contemplate how many doors to confusion in mercantile business are opened by these attempts to legislate for the whole world" . . .

[15] Due to varying conceptions with regard to the method of unification employed by the Brussels Convention, the area of application of the uniform rules as forum law differs from country to country; and this is so not only where the uniform rules are voluntarily adopted, but also where incorporated to discharge an international obligation assumed by signing and ratifying the Convention. *Cf.* 2 Ripert 261; Stoedter, *supra* note 11 at 227.

[16] *Cf.* Colinvaux, *op. cit. supra* note 4 at 115; Carver, *op. cit. supra* note 6 at 209; Stoedter, *supra* note 11 at 228.

[17] See Yiannopoulos, Conflicts Problems in International Bills of Lading: Validity of "Negligence" Clauses, 18 La. L. Rev. (1958) 609 (United States); the papers on German and English law are forthcoming.

companies inserted into bills of lading in their exercise of a practically unlimited "freedom of contracting."[18]

Cases involving international contracts were in principle subject to the law of the place of contracting,[19] at least where the latter coincided with the law of the place of shipment.[20] That law governed such matters as the proof of the contract, its interpretation, the validity of arbitration, and the liability of the carrier.[21] The right of the parties to select their own law had been recognized, though not without limitations.[22]

### 2. *The New Legislation*

On April 2, 1936, the legislature passed an Act[23] which, though modelled on the Brussels Convention of 1924, differed from the latter in several respects.[24] A few days later, on the 9th of April 1936, the President of the French Republic was authorized by law to "ratify and execute" the Brussels Convention itself.[25] This was done by the Decree of March 25, 1937, which thus transformed the Convention, in its entirety, into domestic French law.[26]

[18] See Lyon-Caen et Renault, 5 Traité de Droit Commercial 653 ff. (5th ed. 1931); Sauvage, Manuel Pratique 7; Scapel 15 ff.; Auburn 9; Marais, Les Transports Internationaux 5. However, where the carrier was "grossly" negligent exoneration clauses were invalid. See Scapel 17.

[19] See Sauvage, Manuel Pratique 129; 2 Ripert 344, 345; Lyon-Caen et Renault, *op. cit. supra* note 18 at 787 ff.; Batiffol, Traité Élémentaire de Droit International Privé 657 n. 24 (1955); Id., Les Conflits de Lois en Matière de Contrats 257 (1938); Delaume, Note, [1950] Rev. Cr. Dr. Int. Pr. 212; Ripert, Note [1950] D.J. 557; Demey, Le droit international privé maritime, [1928] Rev. Gen. Dr. 35. See also *infra* text at note 142.

[20] Where place of contracting and place of shipment differed, the courts at times applied the law of the place of shipment. See Com. Ct. Bordeaux, April 19, 1888, 4, Rev. Autran 299 (1888); Aix, May 25, 1916, [1918] Clunet 710; Lyon-Caen et Renault, *op. cit. supra* note 18 at 792. *Cf.* Rouen, Jan. 4, 1870, [1873] D. 2. 187 (law of the place of contracting rather than that of shipment). See Auburn 4, 9; 2 Ripert 254 (place of shipment-place of destination).

[21] See Batiffol, Les Conflits de Lois en Matière de Contrats 259 n. 1–5 (1938); Lyon-Caen et Renault, *op. cit. supra* note 18 at 787, 788, 791; Delaume, *supra* note 19 at 213; Demey, *supra* note 19 at 35. Questions relating to performance, however, were subject to the law of the port of destination. See Lyon-Caen et Renault, *supra,* at 792.

[22] See Note, [1954] Rev. Trim. Dr. Comm. 903; Jambu-Merlin, Note, [1955] Rev. Cr. Dr. Int. Pr. 129; and in general, Kayser, L'autonomie de la volonté en droit international privé dans la jurisprudence française, [1931] Clunet 32. *Cf.* Lyon-Caen et Renault, *op. cit. supra* note 18 at 785, 789; 2 Ripert 349; *infra* text at notes 90, 92, 125.

[23] J. O. April 11, 1936. For its legislative history, see Scapel 23; Sauvage 1; Marais 32; Auburn 31; 2 Ripert 252.

[24] See Sauvage 138 ff.; Marais, les Transports Internationaux 253 ff.; Scapel 76 ff. The main differences between the two texts relate to: (1) carriage of live animals and deck cargo (*cf. infra* text at notes 27, 28; Law of April 2, 1936, Art. 9); (2) charter-parties (but *cf.* Marais 257); (3) limitation of liability; (4) fire; (5) errors in navigation; (6) hidden vices of the vessel; (7) non-negotiable bills of lading; (8) jurisdiction and arbitration; (9) conflict of laws; and (10) effective date (July 4, 1937–October 4, 1937).

[25] J. O. April 11, 1936; [1937] D. 4. 16.

[26] J. O. April 8, 1937; J. O. June 28–29, 1937, [1937] D. 4. 16. Under the Constitution

a. *Subject-matter regulated.* The subject matter regulated by these two texts is substantially that dealt with and agreed upon at the Brussels Conference.[27] Thus, both texts intend to regulate only contracts of affreightment evidenced by bills of lading, and only with regard to claims for damages occurring between the time of loading and discharge.[28] But in contrast to the Convention which covers only hull cargo other than live animals, the domestic law applies to the carriage of deck cargo and live animals;[29] however, contractual exoneration from liability is permissible as to such carriage, in accordance with the Convention.[30]

b. *Substantive provisions.* Both texts introduce into the bills of lading covered by them certain standard clauses defining the risks to be assumed by the carrier (which are absolute and irreducible) and the immunities the carrier can enjoy (in absence of contrary agreement). Clauses relieving the carrier from liability for negligence in the handling, carrying, keeping, and in the discharge of the goods, or which diminish his obligation to make the ship seaworthy are declared null and void;[31] but the carrier is relieved from liability arising from negligence in the navigation or management of the vessel,[32] and from the absolute warranty of seaworthiness.[33]

c. *Area of application.* The two texts are neither co-extensive nor concurrently applicable;[34] and divergencies between them make necessary the precise delimitation of their respective area of application.

(I) *Brussels Convention.* Art. X of the Convention declares that its provisions are applicable to *all* bills of lading issued in the territory

of October 7, 1946, properly ratified international treaties, and published in the Official Journal of the French Government, are directly binding upon the courts. See Guggenheim, 1 Traité de Droit International Public 28 n. 2 (1953); Preuss, "The Relation of International Law to Internal Law in the French Constitutional System," [1950] Am. J. Int. L. 641; De Vabres, La Constitution de 1946 et le droit international, [1948] D. 5. It is disputed whether the constitution operates retroactively. Professor Ripert suggests that, in any event, the Brussels Convention cannot supersede the French domestic law. See 2 Ripert 261.

[27] See League of Nations, Treaty Series 17 (1931). Marais, Les Transports Internationaux 19 ff.; Scapel 77.

[28] See Convention, Art. I(e); Law of April 2, 1936, Art. 1.

[29] See Convention, Art. I(c); Law of April 2, 1936, Art. 1, 9.

[30] See Law of April 2, 1936, Art. 9.

[31] See Convention, Art. III(8); Law of April 2, 1936, Art. 9. *Cf.* De la Grassière, Cas exonératoires et réserves au connaissement, [1957] D.M.F. 647.

[32] See Convention, Art. IV(2)(a); Law of April 2, 1936, Art. 4(1); Marais, Les Transports Internationaux 19 ff.; Scapel 78. The Law of April 2, 1936, compared to the Brussels Convention, has a broader scope. The former exonerates the carrier from liability for "faute nautique"; the latter only for error in "management or navigation." See Sauvage 391.

[33] See Convention, Art. IV(1); Law of April 2, 1936, Art. 4(2).

[34] While the Convention was declared inapplicable in the colonies, protectorates, and overseas territories, (J.O. April 8, 1937; J.O. June 28–29, 1937; [1937] D. 4. 16), the domestic French Law of April 2, 1936, is applicable throughout the French Union (Art. 12). *Cf.* Marais, Les Transports Internationaux 22 ff.; Auburn 28.

of any of the contracting states.[35] This, taken literally, would limit substantially the area of application of the domestic law of April 2, 1936, as the Convention would also cover bills of lading involving exclusively domestic contacts.[36] In France, such a result was thought to be "absolutely inacceptable and manifestly contrary to the intention of the contracting states who did envisage solely international transactions."[37] The need for a restrictive interpretation of Art. X of the Convention has been early recognized, and it became settled that the Convention applies only to cases involving a conflict of "international interests."[38] However, no general agreement has been so far reached on the definition of this term, and different views have been taken by writers and courts.

(1) *Nationality*. Most French writers suggest that a conflict of international interests is involved, and the Convention applies irrespective of the place of issue of the bill of lading,[39] if the parties to the contract of affreightment[40] are nationals of two different (signatory)[41]

[35] See Convention, Art X "The provisions of this Convention shall apply to all bills of lading issued in any of the contracting states." This provision which originally may have been intended to establish an obligation for the contracting states to transform into domestic law the substantive provisions of the Convention (Knauth 152, 154), once itself enacted into law, seems to acquire a new meaning and to operate as a conflict rule. *Cf.* Plaisant 13, 275; Ripert, La Conférence Diplomatique de Bruxelles, [1923] Rev. Dor II 49, 50; Dubosc, De la loi applicable au contrat de transport maritime, [1951] D.M.F. 211.

[36] See Comm. Ct. Marseille, June 2, 1950, [1951] D.M.F. 89; Marais, Les Transports Internationaux 22; Sauvage, Manuel Pratique 128. Thus, the domestic law would be applicable only where, according to choice of law rules, "French" law would govern a bill of lading issued in the territory of a nonsignatory country. And even then, it would be a matter of interpretation which of the two texts would apply, the Convention being also "domestic" law. See Jambu-Merlin, Note, [1957] Rev. Cr. Dr. Int. Pr. 474. *Cf. infra* text at notes 134–140.

[37] Note, [1951] S. 2. 56. See also Jambu-Merlin, Note, [1955] Rev. Cr. Dr. Int. Pr. 129; Delaume, Note, [1950] Rev. Cr. Dr. Int. Pr. 212, 214; Marais, Les Transports Internationaux 22; Auburn 185; Guyon, Controverses sur la notion de transport international de marchandises, [1958] D.M.F. 195; 2 Ripert 261 ff.

[38] See Comm. Ct. Marseille, June 2, 1950, [1951] D.M.F. 88. See also Note, [1951] Rev. Trim. Dr. Comm. 821; Jambu-Merlin, Note, [1955] Rev. Cr. Dr. Int. Pr. 129; Sauvage, Manuel Pratique 128. But *cf.* Pergeroux, L'introduction en France de conventions pour l'unification du droit maritime, [1936] Annales de Droit Commercial 221, asserting that the Convention applies to both domestic and international transactions.

[39] See Sauvage, Manuel Pratique 128, 132. But *cf.* Comm. Ct. Havre, Feb. 12, 1951 [1951] D.M.F. 238.

[40] It is disputed which persons are parties to the contract of affreightment. Some courts and writers declare that parties are carriers, shippers, and consignees. See Comm. Ct. Marseille, June 2, 1950 [1951] D.M.F. 88; Comm. Ct. Marseille, March 2, 1951, [1952] D.M.F. 162; Comm. Ct. Seine, Jan. 8, 1948, [1949] D. 62; 1 Ripert 71; Sauvage, Manuel Pratique 120. But *cf.* Comm. Ct. Havre, Nov. 3, 1951 [1951] D.M.F. 235; Dubosc, *supra* note 35 at 214 (shippers and carriers) .

[41] Some writers assert that the Convention applies where all parties to the contract of affreightment are citizens of signatory countries. See 1 Ripert 71; Sauvage, Manuel Pratique 131, 132. But *cf. infra* note 50.

countries.[42] This view was followed in a case involving carriage of goods on a French vessel from Marseille to Noumea.[43] The Commercial Court of Marseille held in that case the Convention applicable on the ground that one of the parties to the contract had a foreign nationality.[44]

This "nationality" test, if consistently followed, would exclude the application of the Convention from all bills of lading issued in a signatory country (whether in France or abroad) where all parties to the contract would be French nationals,[45] nationals of the same foreign country (whether or not adhering to the Brussels Convention),[46] or where some of the parties to the contract would be nationals of a nonsignatory country.[47] The Convention, on the other hand, would apply also without respect to the place of issue of the bill of lading to contracts concluded between French nationals and nationals of other signatory countries or to contracts concluded between nationals of two other signatory countries.[48]

This approach is open to several objections. Firstly, it is a *contra legem* interpretation of an international text; secondly, it gives rise to difficult questions connected with nationality, such as dual citizenship, statelessness, nationality of corporations; thirdly, unless it be specified that the difference of nationality should exist at the time of conclusion of the contract rather than at the time of litigation, the door will be open to fraudulent endorsements to effect a change of the applicable law, and security will be minimized;[49] and fourthly, this approach does not accord with the practice of most of the courts.[50]

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[42] See Marais, Note, [1951] S. 2. 56; Sauvage 136; Manuel Pratique 130; Scapel 73; Auburn 185.

[43] See Comm. Ct. Marseille, June 2, 1950, [1951] D.M.F. 88 (applying the Convention to a non-negotiable bill of lading and in spite of the fact that the shipper was citizen of a nonsignatory country). *Cf.* Aix, Jan. 11, 1955 [1956] J.C.P. 9333; Comm. Ct. Nantes, Dec. 5, 1955, [1956] D.M.F. 565.

[44] But *cf. infra* note 50(2).

[45] See Sauvage, Manuel Pratique 129; Note, [1951] S. 2. 56.

[46] See Sauvage, *ibid.* 128, 131, 132.

[47] See Sauvage, *ibid.* 131; Note, [1951] S. 2. 56. *Cf. supra* note 41.

[48] See Sauvage, *ibid.* 132.

[49] *Cf.* Comm. Ct. Marseille, June 2, 1950, [1951] D.M.F. 88; Marais, Les Transports Internationaux 23 (time of issue controls).

[50] See, e.g. *infra* notes 52, 60. In general, it should be noted that (1) most of the cases cited in support of the "nationality" test are inconclusive. See, e.g., citations in Sauvage, Manuel Pratique n. 8–11, 15: Montpellier Ct. of App., Dec. 14, 1951 [1952] D.M.F. 256 (not involving application of uniform rules but determination of seaworthiness as a fact); Comm. Ct. Havre, Nov. 3, 1950 [1951] D.M.F. 235 (declaring the Convention inapplicable since the contract involved French parties; Comm. Ct. Havre, Feb. 12, 1951, [1951] D.M.F. 238 (declaring the Convention inapplicable since the bill of lading had been issued in a nonsignatory country); Comm. Ct. Havre, Sept. 16, 1953, [1954] D.M.F. 300; Comm. Ct. Havre, Aug. 21, 1953, [1954] D.M.F. 235; Comm. Ct. Dunkirk, July 23, 1951 [1951] D.M.F. 97; Paris Ct. of App., June 6, 1952 [1952] D.M.F. 421 (the courts expressly relying in all cases both on the fact that the bill of lading had been issued in a signatory country and on the parties' divergency of citizenship); (2) in some cases, the French courts applied the Law of April 2, 1936, rather

(2) *Ports.* According to Professor Niboyet the Convention applies, apparently irrespective of the place of issue of the bill of lading, if there is a shipment of goods between French ports and ports of other (signatory) countries.[51]

The fact that the shipment was between the ports of two different countries was thought to be determinative in a decision rendered by the Commercial Court of Rouen. In that case the Convention was applied to a contract concluded in France, among French, for the shipment of goods from Rouen to Lisbon.[52] This view, though approaching that taken in other countries adhering to the Brussels Convention,[53] and thus conducive to international uniformity, can not find support in the text of the Convention and conflicts with almost all of the reported French cases.[54]

(3) *Nationality and ports.* Though no doctrinal approach seems to have been developed along these lines, the French courts, quite frequently, apply the Convention by stressing both the difference of

than the Brussels Convention to bills of lading involving parties of different nationality. See, e.g., Algier Ct. of App., Feb. 23, 1951, [1951] D.M.F. 435 (Marseille-Oran; Morocco shipper, English carrier); Comm. Ct. Havre, Nov. 3, 1950, [1950] D.M.F. 235 (France-Syria, French carrier and shipper, Syrian consignee); Bordeaux Ct. of App., Nov. 5, 1957, [1958] D.M.F. 215 (Morocco-Bordeaux, French shipper and consignee, Dutch carrier). *Cf.* Comm. Ct. Seine, Feb. 22, 1957 [1957] D.M.F. 497 (Morocco-Rouen, Dutch carrier; applying Moroccan law); (3) some courts do not seem to attach significance to nationality, and cases may be cited where the Convention was applied to contracts involving parties of undetermined nationality. See, e.g., Rouen Ct. of App., May 16, 1953, [1953] D.M.F. 683; Comm. Ct. Seine, Jan. 8, 1948, [1949] D. 62; Paris Ct. of App., June 6, 1952, [1952] D.M.F. 421. Parties clearly nationals of nonsignatory countries were involved in Comm. Ct. Marseille, June 2, 1950, [1951] D.M.F. 89 (Swiss); Comm. Ct. Algiers, Jan. 10, 1955, [1955] D.M.F. 549 (Dutch); (4) in most instances, connecting factors other than nationality were declared to be controlling; *infra* notes 51, 60; and (5) in all cases the bill of lading had been issued in a signatory country; *infra* note 67. See also criticism by Guyot, *supra* note 37 at 199.

[51] See Niboyet, Session of Jan. 27, 1938, of the French Association of Maritime Law, 37 Rev. Dor 420. *Cf.* Marais 22; Guyot, *supra* note 37 at 200. The draft law of April 2, 1936, included a provision making its text applicable to "all shipments to and from French ports." This provision was eliminated from the final text approved. See Delaume, Note,, [1950] Rev. Cr. Dr. Int. Pr. 214, 215.

[52] Comm. Ct. Rouen, Feb. 4, 1950, [1950] D.M.F. 285. See also Rouen, May 16, 1953, [1953] D.M.F. 683, aff'd Cass. Feb. 14, 1956, [1956] D.M.F. 336 (Belgium-France; French parties); Comm. Ct. Seine, June 8, 1955, [1956] D.M.F. 630. But *cf.* Paris Ct. of App., Nov. 21, 1949, [1950] D.M.F. 179 (applying the French domestic law to a shipment from the United States to France on the ground the contract was concluded between French parties and by relying in part on the law of the place of contracting and that of the port of destination); Comm. Ct. Havre, Nov. 3, 1950, [1951] D.M.F. 235 (difference of ports irrelevant); *supra* note 50(2).

[53] See Yiannopoulos, "Conflicts Problems in International Bills of Lading: Validity of 'Negligence' Clauses," 18 La. L. Rev. (1958) 609, 618. The Comité Maritime International, at the suggestion of the French delegation, dealt with a draft resolution designed to amend Art. 10 of the Convention—by adding the words "on the condition that the carriage is for another State, and without taking into account the nationality of the parties." The proposed amendment was firmly opposed by delegations from Anglo-Saxon countries. See Bulletin, Com. Mar. Int. No. 104, p. 601 (1949).

[54] *Cf. supra* notes 43, 44; *infra* notes 55, 56, 61, 63, 64.

nationality between the parties and the fact that the shipment is between the ports of two different countries. In a case involving a carriage of goods from Marseille to Alexandria, the Commercial Court of Seine held the Convention applicable on the ground that the contract of affreightment involved parties of different nationality and shipment of goods between the ports of two different countries.[55] And the Court of Appeals of Madagascar held the Convention applicable on the same ground in an action for short delivery of cargo carried aboard a foreign vessel from Denmark to Madagascar.[56]

(4) *Place of issue.* According to Delaume, the Convention applies to *all* bills of lading issued in a signatory country,[57] with the exception of those issued in France for the carriage of goods between French ports.[58]

This approach is conducive to clarity and simplicity, accords with Art. X of the Convention and contributes to international uniformity. The exception in favor of the French law in cases involving exclusively domestic contacts does not derogate from the Convention, nor does it prejudice the achievement of international uniformity. It may well be that the High Contracting Parties did not actually intend to subject to the Convention both domestic and international transactions;[59] and on the other hand, the domestic law will in most instances give a solution identical with that given by the Convention.

In several cases the French courts have declared that the Convention

[55] See Comm. Ct. Seine, Jan. 8, 1948, [1949] D. 62. See also Comm. Ct. Marseille, March 7, 1951, [1952] D.M.F. 162; Comm. Ct. Rouen, Jan. 10, 1955, [1955] D.M.F. 545; Comm. Ct. Seine, Dec. 12, 1949, [1950] D.M.F. 295. *Cf.* Paris Ct. of App., June 6, 1952, [1952] D.M.F. 421, involving shipment from Marseille to Shanghai under contract concluded between French carrier and foreign shipper on behalf of a foreign consignee. The court held the Convention applicable by simply pointing to the "international" character of the contract. Similar reference was made in Comm. Ct. Algiers, April 10, 1954, [1954] D.M.F. 686 (Denmark-Algeria); Comm. Ct. Algiers, Jan. 10, 1955, [1955] D.M.F. 549 (Holland-France); Rouen Ct. of App., July 12, 1957, [1958] D.M.F. 521 (Wismar-Rouen); Rouen Ct. of App., July 12, 1957, [1957] Rev. Cr. Dr. Int. Pr. 467 (United States-France); Tunis Ct. of App., March 16, 1955, [1956] D.M.F. 275 (Tunis-England), Cass., Jan. 27, 1958, [1958] D.M.F. 269 (London-Dunkirk) (all cases involving also parties of different nationality).

[56] See Madagascar Ct. of App., March 19, 1952 [1952] D.M.F. 599. A bill of lading issued in Denmark provided that "any stipulation contrary to the applicable law should be considered as not written." The court, relying on that clause, held the Convention applicable. These words, the court declared, necessarily referred to the Brussels Convention since the parties had different nationality and the contract involved carriage between the ports of two countries. It should be noted that the Convention does not apply *proprio vigore* in the colonies. See *supra* note 34.

[57] See Delaume, Note, [1950] Rev. Cr. Dr. Int. Pr. 214; Jambu-Merlin, Note, [1955] Rev. Cr. Dr. Int. Pr. 129; Note, [1951] Rev. Trim. Dr. Comm. 822.

[58] Such bills of lading are subject to the domestic French law. See Delaume, *supra* note 57 at 214, 215. *Cf. infra* notes 73–77.

[59] See Protocol of Signature (2); Note attached by the Ambassador of Japan; "Japan is of the opinion that the Convention, as a whole, does not apply to the national coasting trade . . ."; Colinvaux, *op. cit. supra* note 4 at 142, 143.

applies to all bills of lading issued in a signatory country;[60] but unfortunately this most preferable view has not been consistently followed.[61]

(5) *Place of issue and nationality.* A compromise position has been taken by Professor Ripert who suggested that the Convention applies to bills of lading issued in the territory of a signatory country, if the parties to the contract of affreightment such as shippers, carriers, and consignees, have different nationality, or where one at least of the parties is not a national of the forum or of the country of performance.[62]

This combination of places of issue and nationality tests leads to a very limited application of the Convention. Contrary to Art. X of the Convention, the uniform rules would not apply to bills of lading issued in France or in any other signatory country where all parties to the contract would have the same nationality (whether that of a signatory country or not) or where some parties would be nationals of a non-signatory country.

Professor Ripert reads in Art. X a not-so-obvious qualification; and his approach is open to the same critical remarks as the nationality test in its pure form. However, though contrary to what we may call the "majority rule," Professor Ripert has been followed by several French courts. In a typical case, the Court of Appeals of Le Havre declared the Convention applicable to a bill of lading issued in Belgium for the shipment of goods to Montevideo, relying on the fact that the bill of lading had been issued in a signatory country and the parties to the contract had different nationalities.[63] In another case, the Commercial Court of Dunkirk, relying on similar facts, held the Convention applicable to a bill of lading issued in France for the carriage of goods to Madagascar.[64]

(6) *Place of issue and ports.* Finally, it has been suggested that the Convention applies to bills of lading issued in a signatory country, if there is a shipment of goods to or from French ports,[65] (in foreign trade). Only one case applied the Convention on such ground,

[60] On several occasions the courts declared the Convention inapplicable to bills of lading issued in nonsignatory countries. See Cass. Oct. 14, 1957, [1958] D.M.F. 78 (Brazil); Comm. Ct. Bordeaux, Dec. 15, 1938 [1941] S. 2. 30 (Argentina); Comm. Ct. Havre, Feb. 12, 1951, [1951] D.M.F. 238 (Brazil). See also *infra* note 67.

[61] See *supra* notes 55, 56; *infra* notes 63, 64.

[62] See 2 Ripert 263; La Conférence Diplomatique de Bruxelles, [1923] Rev. Dor II 65; Note, [1950] D.J. 557; Dubosc, *supra* note 35 at 214.

[63] Comm. Ct. Havre, Sept. 16, 1953, [1954] D.M.F. 300.

[64] Comm. Ct. Dunkirk, July 23, 1951, [1952] D.M.F. 97. See also Comm. Ct. Havre, Aug. 21, 1953, [1954] D.M.F. 235 (contract concluded in France between French carrier and foreign shipper for shipment from France to Casablanca); Comm. Ct. Marseille, April 28, 1952, [1952] D.M.F. 500 (Philippines-France; parties of different nationality). *Cf.* Comm. Ct. Havre, Nov. 3, 1951, [1951] D.M.F. 235 (the Convention would control if the bill of lading had been issued in a signatory country between parties of different nationality).

[65] See Prodromides, Champs d'application respectifs de la Convention de Bruxelles du 25 Août 1924 sur les connaissements et de la Loi du 2 Avril 1936, [1953] D.M.F. 123.

while several cases could be cited applying the Convention to carriage of goods between French ports.[66] Moreover, this approach limits the area of application of the Convention contrary to Art. X, and is liable to the same objections as the tests suggested by Professors Niboyet and Ripert.

(7) *Issue in a signatory country and difference of nationality or ports: a summary of case law.* We have seen that the Convention has been applied by the French courts on a variety of grounds: difference of nationality and/or ports, quite apart from the place of issue of the bill of lading, have been relied upon; issue of the bill of lading in a signatory country with or without regard to the nationality of the parties, has been also resorted to as a contact delimiting the application of the Convention.

However, we should not hastily conclude that the Convention will be applied by the French courts to all cases involving parties of different nationality and/or carriage of goods between the ports of two different countries. In fact, in all cases that have been reported, the bill of lading was issued in a signatory country, and no case has been found in which the Convention was applied to a bill of lading issued in a non-signatory country.[67] It seems equally doubtful that a French court will apply the Convention to all bills of lading issued in a signatory country where no other foreign contacts are involved. In all of the cases relying on the fact that the bill of lading was issued in a signatory country, other international contacts were present, such as carriage of goods between the ports of two different countries, or parties of different nationality.

It is my conclusion that the language of the French courts is, perhaps, misleading and that the seemingly inconsistent cases can be reconciled by assuming the existence of a wider rule of decision than the one announced in single cases. It is thus on the basis of a factual analysis of the "actual doing"[68] of the French courts that we may arrive at the conclusion that *the Brussels Convention applies to all bills of lading issued in a signatory country (including France), between parties of different nationality,*[69] *or for the carriage of goods between the ports of two different countries.*[70]

[66] See Comm. Ct. Dunkirk, April 26, 1954, [1955] D.M.F. 436 (applying the Convention on the ground that the bill of lading was issued in the United States for carriage from an American to a French port). But *cf.* Comm. Ct. Dunkirk, July 23, 1951, [1952] D.M.F. 97 (Dunkirk-Madagaskar); Comm. Ct. Marseille, June 2, 1950, [1951] D.M.F. 88 (Marseille-Noumea).

[67] *Cf. supra* note 60; Guyon, *supra* note 37; Jambu-Merlin, Note, [1957] Rev. Cr. Dr. Int. Pr. 474; Poitiers, May 17, 1939, [1939] S. 2. 124 (Saigon-La Rochelle).

[68] See Llewellyn, On Reading and Using the Newer Jurisprudence, 40 Col. L. Rev. (1940) 581, 608.

[69] Application of the Convention does not seem to be limited to citizens of signatory countries. See *supra* note 50(3).

[70] Application of the Convention does not seem to be limited to shipments between

(II) *Law of April 2, 1936.* In contrast to the Brussels Convention, the law of April 2, 1936, contains no provisions delimiting its area of application.[71] One would be thus justified in assuming that the legislature left the determination of its area of application to the courts and to the general conflicts theory, in accordance with the settled rules of choice of law. This, however, did not happen. Most courts and writers, stressing the public policy character of the statute, declared that the general conflicts rules were inapplicable[72] and tried to define its area of application with the help of contacts fabricated for the occasion. But except for bills of lading involving exclusively domestic contacts (which are unanimously declared to be subject to the domestic law)[73] there is no agreement with regard to the bills of lading covered by that statute.

The problem usually arises in cases involving questions which, though dealt with in the Brussels Convention, are not covered by it, as where the bill of lading is issued in a non-signatory country.[74] With respect to such cases, it has been suggested that the domestic law is compulsorily applicable where all parties to the contract are French,[75]

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ports of signatory countries. See Comm. Ct. Havre, Sept. 16, 1953, [1954] D.M.F. 300 (Antwerp-Montevideo); Paris Ct. of App., June 6, 1952, [1952] D.M.F. 421 (Marseille-Shanghai).

[71] *Cf.* Sauvage, Manuel Pratique 128; *supra* note 51.

[72] See Delaume, Note, [1950] Rev. Cr. Dr. Int. Pr. 128, 214; Marais 39; Sauvage, Manuel Pratique 132; Dubosc, *supra* note 35 at 215; Prodromides, *supra* note 65 at 126. *Cf.* 2 Ripert 253.

[73] See Delaume, Note, [1950] Rev. Cr. Dr. Int. Pr. 214, 215. *Cf.* Cass., Jan. 4, 1950, [1950] S. 1. 180; Rouen Ct. of App., Jan. 22, 1953, [1953] D.M.F. 262; *supra* notes 37, 38.

[74] *Cf. supra* text at note 67. All writers seem to attribute preponderance to the Brussels Convention. Thus, all views concerning the area of application of the Law of April 2, 1936, actually refer to cases not covered by the Convention.

[75] See Scapel 73, Marais, Les Transports Internationaux 23; Dubosc, *supra* note 35 at 214; Sauvage, Manuel Pratique 129; Notes, [1951] S. 2. 56; [1951] Rev. Trim. Dr. Comm. 822, 823; Comm. Ct. Havre, Nov. 3, 1950, [1951] D.M.F. 235, *supra* note 50(2). But *cf.* Comm. Ct. Rouen, Feb. 4, 1950, [1951] D.M.F. 285, *supra* text at note 52; Cass., Feb. 14, 1956, [1956] D.M.F. 336, *supra* note 52, applying the Convention among French parties. Application of domestic law to bills of lading issued in a signatory country infringes on the Convention. See Jambu-Merlin, Note, [1957] Rev. Cr. Dr. Int. Pr. 474. Cases frequently cited for the proposition that the domestic law applies to all bills of lading involving French parties are not conclusive. See, e.g., Paris Ct. of App., Nov. 21, 1949, [1950] D.M.F. 179, cited Sauvage, Manuel Pratique 129. The case involved formal validity of the bill of lading, a question not regulated by the uniform rules (*infra* text at note 144); Cass., Feb. 21, 1950 [1950] D.M.F. 247, cited Note, [1951] S. 2. 56. In that case, the bill of lading had been issued in a nonsignatory country (*infra* text at note 80); Comm. Ct. Havre, Feb. 12, 1951, [1951] D.M.F. 325, cited Sauvage, Manuel Pratique 129. The case involved a bill of lading issued in Brazil, and the court held that neither the Convention nor the domestic law were applicable; reversed, Cass., July 7, 1954, [1954] Rev. Trim. Dr. Comm. 903 (domestic law governs as implicitly intended); and finally, Rouen Ct. of App., Jan. 22, 1953, [1953] D.M.F. 262, cited Sauvage, Manuel Pratique 129, involved exclusively domestic contracts.

where the place of contracting is in France,[76] where the shipment is to a French port,[77] or even where the forum is in France.[78]

The courts seem to have adopted the widest possible delimitation of the domestic law.[79] In a much debated case, the Court of Cassation applied the law of April 2, 1936, to a bill of lading issued in China for a shipment of goods from Shanghai to Saigon aboard a French vessel.[80] In that case, the carrier claimed limitation of liability according to the terms of a clause in the bill of lading limiting liability to an extent much below the limit of the law of April 2, 1936. The court of Saigon declared that clause to be null and void as against public policy, and the Court of Cassation affirmed. "Whatever was the law under which the parties intended to contract," the court declared, "whatever be the value of their agreements under that law, the French courts cannot give effect to a contract concluded abroad, except where that contract is not repugnant to French public policy. . . ." "The notion of public policy," the court also announced, "is not incompatible with the performance of an obligation in France, deriving from a contract concluded in a place where the law of April 2, 1936, was inapplicable. . . ." As a result, the liability of the carrier was limited according to the standards of the law of April 2, 1936.

There was much adverse criticism, directed at the principle announced rather than at the actual result which, concededly, was reason-

[76] See Jambu-Merlin, Note [1955] Rev. Cr. Dr. Int. Pr. 129; Ripert, Note, [1950] D.J. 557. *Cf.* Sauvage, Manuel Pratique 129; Delaume, Note, [1950] Rev. Cr. Dr. Int. Pr. 214, 215; Algiers, Ct. of App., Feb. 23, 1951, [1951] D.M.F. 435 (Marseille-Oran, aboard English vessel; applying French domestic law rather than the Convention); Paris Ct. of App., Nov. 21, 1949, [1950] D.M.F. 179 (United States-Havre; applying French domestic law by relying on the common nationality of the parties and in part on the law of the place of contracting and that of the port of destination).

[77] See Delaume, Note, [1950] Rev. Cr. Dr. Int. Pr. 214, 215; Sauvage, Manuel Pratique 129. *Cf.* Cass. Feb. 21, 1950, [1950] D.M.F. 247, *infra* note 80; Note, [1950] D.J. 557; [1951] S. 2. 56; [1951] Rev. Trim. Dr. Comm. 822, 823. The Convention, however, has been applied to shipments between French ports where a conflict of "international interests was involved. See *supra* note 66.

[78] *Cf.* Prodromides, *supra* note 65 at 126. *Cf.* Note, [1951] Rev. Trim. Dr. Comm. 821; Delaume, Note [1950] Rev. Cr. Dr. Int. Pr. 214.

[79] *Cf.* Delaume, Note, [1950] Rev. Cr. Dr. Int. Pr. 128. See Comm. Ct. Seine, Jan. 12, 1948, [1949] D.J. 62 (Casablanca-France), reversed on other grounds, Cass. July 6, 1954, [1954] D.M.F. 584; Comm. Ct. Bordeaux, Dec. 15, 1941, [1941] S. 2. 30 (Buenos Aires-France); Cass. Feb. 21, 1950, [1950] D.M.F. 247 (Shanghai-Saigon); Casablanca, Jan. 26, 1954, [1955] D.M.F. 51 (Casablanca-Abidjan); Comm. Ct. Havre, Nov. 3, 1951, [1951] D.M.F. 235 (France-Syria). In several instances, the Law of April 2, 1936, has been applied to cases involving international contacts without discussion of the issue of governing law. See, e.g., Cass. Jan. 8, 1958, [1958] D.M.F. 208; (Dunkirk-Saigon, damage in Djibouti). But *cf.* Cass. Oct. 14, 1957, [1958] D.M.F. 78 (Santos-Havre; the domestic French law does not apply to international contracts, except if stipulated) (dictum); Comm. Ct. Havre, Feb. 12, 1951, [1951] D.M.F. 238 (Santos-Havre).

[80] Cass. Feb. 21, 1950, [1950] D.M.F. 247.

able and fair.[81] It was pointed out that this result could be justified only if the contract was governed by French law since the notion of French public policy should leave unaffected relations subject to foreign law.[82] But, apart from theoretical niceties regarding the solution of the conflicts problem, the actual implication of this case is that the law of April 2, 1936, applies *proprio vigore* as forum law not only to bills of lading issued in France and not covered by the Brussels Convention, but also to bills of lading issued in countries not adhering to the Brussels Convention for the carriage of goods to French ports.[83] This accords with the practice of other countries adhering to the Brussels Convention who declared the uniform rules applicable to all bills of lading involving carriage of goods to or from their ports;[84] and as the law of April 2, 1936, closely follows the Convention, the rule announced by the Court of Cassation contributes to the realization of international uniformity.

## II. "Negligence" Clauses in Bills of Lading Covered by the Uniform Rules: No Choice of Law

It is well-settled in France that both the law of April 2, 1936, and the Brussels Convention express the public policy of the forum,[85] and that their provisions, in contrast to the Commercial Code, are "imperative."[86] Thus, where the Brussels Convention, or the law of April 2, 1936, are applicable,[87] clauses directly exonerating the carrier from liability for negligence (other than in the navigation or management of the vessel), or lessening that liability otherwise than as provided by these texts, are null and void.[88]

However, apart from agreements exonerating the carrier directly,

[81] See Ripert, Note, [1950] D.J. 557; Jambu-Merlin, Note, [1955] Rev. Cr. Dr. Int. Pr. 129; see also Jambu-Merlin, Note, [1957] Rev. Cr. Dr. Int. Pr. 474. Note, [1951] Rev. Trim. Dr. Comm. 822, 823.

[82] See Ripert, Note, [1950] D.J. 557; [1951] Rev. Trim. Dr. Comm. 822, 823.

[83] The Law of April 2, 1936, is thus compulsorily applicable (1) where all contacts are French: Cass. Jan. 4, 1950, [1950] S. 1. 180; Rouen Ct. of App., Jan. 22, 1953, [1953] D.M.F. 262; and (2) to bills of lading issued in nonsignatory countries for carriage to France; Cass. Feb. 21, 1950, [1950] D.M.F. 247; Cass. July 6, 1954, [1954] D.M.F. 584; Comm. Ct. Bordeaux, Dec. 15, 1938, [1941] S. 2. 30; Casablanca, Jan. 26, 1954, [1955] D.M.F. 51; Cass. July 7, 1954 [1954] Rev. Trim. Dr. Comm. 903. In such cases, however, the parties may refer to the Brussels Convention. See *infra* notes 130, 133

[84] See Note, [1951] S. 2. 56; *supra* note 53.

[85] See Paris Ct. of App., June 6, 1952, [1952] D.M.F. 421, 422.

[86] *Cf. supra* note 18; infra text at note 90.

[87] *Cf. supra* text at notes 70, 83; Jambu-Merlin, Note, [1957] Rev. Cr. Dr. Int. Pr. 475; Rouen Ct. of App., July 12, 1957, [1958] D.M.F. 27.

[88] *Cf. supra* text at note 31. These texts curtail contractual freedom only with regard to questions dealt with, and bills of lading covered by them. See *infra* text at note 116; Sauvage 121; Ripert, La loi Française du 2 avril 1936 sur les transports de marchandises par mer, [1936] Rivista di Diritto della Navigazione 357, 362. Bills of lading outside the scope of these texts, if governed by French law, are subject to the Commercial Code. Ripert, *ibid.*

exoneration from negligence liability may be attempted by clauses stipulating the application of a more favorable law, by granting exclusive jurisdiction to the courts of a foreign country, or by providing for the settlement of disputes by arbitration.[89]

### *1. Stipulation of the applicable law*

Most courts and writers, stressing the "public policy" character of the new legislation, declare that a stipulation providing for the application of foreign law, inserted into a bill of lading covered by the Brussels Convention,[90] or by the law of April 2, 1936,[91] will be disregarded, and the liability of the carrier will be determined according to the text which is applicable under the circumstances.[92]

There are several cases, however, which seemingly give effect to clauses stipulating the applicable law to bills of lading covered by the uniform rules.[93] In a case involving a contract concluded in the United States between parties of different nationality for a carriage of goods to France, the Court of Appeals of Rouen held the Convention applicable by a reference to the bill of lading which incorporated the Convention.[94] And in another case, involving also a contract concluded in the United States for a carriage of goods to France, the Commercial

[89] *Cf.* De la Grassière, La clause d'un connaissement attributive de compétence à un tribunal étranger, [1952] D.M.F. 119, 122; Van Empel, Clauses attributives de jurisdiction et de renvoi à une jurisdiction étrangère, [1956] D.M.F. 631.

[90] In spite of disagreement concerning the area of application of the Convention, it is generally conceded that clauses stipulating the applicable law to contracts covered by it should be disregarded. See Delaume, Note, [1950] Rev. Cr. Dr. Int. Pr. 128, 214; Sauvage, Manuel Pratique 132; Marais, Les Transports Internationaux 68; Jambu-Merlin, Note, [1955] Rev. Cr. Dr. Int. Pr. 129; Rouen Ct. of App., July 12, 1957, [1958] D.M.F. 27. *Cf.* Comm. Ct. Rouen, Jan. 10, 1955, [1955] D.M.F. 545.

[91] See Rouen Ct. of App., July 12, 1957, [1958] D.M.F. 27; Ripert, Note, [1950] D.J. 557; Sauvage, Manuel Pratique 129; Jambu-Merlin, Note, [1955] Rev. Cr. Dr. Int. Pr. 129; Delaume, Note, [1950] Rev. Cr. Dr. Int. Pr. 215.

[92] See Rouen Ct. of App., July 12, 1957, [1958] D.M.F. 27; Sauvage, Manuel Pratique 132; Marais, Les Transports Internationaux 126. *Cf. infra* cases, notes 93–96. While it is generally conceded that choice of law is forbidden in cases covered by the uniform rules, differences of opinion with regard to the area of application of the Brussels Convention and of the law of April 2, 1936, result in disagreement with regard to cases where party autonomy may be exercised. According to Delaume ([1950] Rev. Cr. Dr. Int. Pr. 214, 215), choice of law is permissible only as to bills of lading issued in nonsignatory countries for carriage to nonsignatory countries. Sauvage suggests (Manuel Pratique 131, 132), that the parties are free to select the applicable law where the contract of affreightment is concluded between citizens of signatory and nonsignatory countries. According to Jambu-Merlin, (Note, [1955] Rev. Cr. Dr. Int. Pr. 129), the parties, whether French or foreign nationals, can stipulate the applicable law to bills of lading issued in nonsignatory countries. Finally, Professor Ripert (Note, [1950] D.J. 557) seems to imply that selection of the applicable law is allowed in all bills of lading issued outside France, with the exception perhaps, of those issued in a signatory country and involving conflict of international interests.

[93] See Comm. Ct. Havre, Sept. 5, 1952, [1953] D.M.F. 145 (Havre-Montevideo; Convention applied as contractually incorporated). See also *infra* notes 94–95.

[94] Rouen Ct. of App., March 6, 1952, [1952] D.M.F. 481.

Court of Seine applied the American Carriage of Goods by Sea Act referring to a statement in the bill of lading which incorporated that law, and pointing out that the American law did not differ from the Convention.[95]

A decision of the Court of Cassation[96] added to the confusion by apparently giving effect to the "implied" intention of the parties that the law of April 2, 1936, be applied to a contract which, according to previous ruling,[97] was as a matter of law subject to that law. A clause in a bill of lading issued in Brazil for the carriage of goods to France provided that the contract was to be governed by "the law of April 2, 1936, or the International Convention of August 25, 1924," but only to the extent their application was obligatory for the parties. In a suit by the consignee for damage to the cargo, the carrier claimed limitation of liability under the law of April 2, 1936, and the Court of Rouen granted the petition on the ground that the parties had expressly subjected their contract to that law. The consignee, being interested in taking the case out of the uniform rules, appealed to the Court of Cassation contending that the court below had misinterpreted the contract; application of the law of April 2, 1936, he argued, was intended only to the extent that this law was "compulsorily" applicable. The Cassation rejected appeal on the ground that misinterpretation was impossible since the clause in question was "too obscure and ambiguous" to have any effect; and affirmed on the ground that the parties had impliedly intended "French" law to govern their contract. This intention was derived from the provisions of the entire contract "since the shipper contracted on behalf of a French buyer at whose risk the goods travelled, the vessel and the port of destination were French, and moreover, exclusive jurisdiction was granted to the court of Rouen. . . ."[98]

In view of the facts of these cases, it seems unrealistic to assume that the French courts will give effect to a stipulation providing for the application of other than uniform law as to bills of lading covered either by the Brussels Convention or the law of April 2, 1936. In all cases the law selected by the parties was in effect the same which the court would apply without the stipulation.

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[95] Comm. Ct. Seine, Jan. 21, 1952, [1952] D.M.F. 186. *Cf.* Madagascar Ct. of App., March 19, 1952, [1952] D.M.F. 599, *supra* note 56.

[96] Cass. July 7, 1954, [1955] Rev. Cr. Dr. Int. Pr. 129.

[97] See Cass. Feb. 21, 1950, [1950] D.M.F. 247, *supra* note 80.

[98] This decision has been criticized as inconsistent with itself and with the "well-settled" principle that the law of the place of contracting governs, and an attempt was made to explain it on technical grounds. See Jambu-Merlin, Note, [1955] Rev. Cr. Dr. Int. Pr. 129. In a recent case, Cass. Oct. 14, 1957, [1958] D.M.F. 78, involving identical facts, the court held that the parties subjected themselves to French law, as they were free to do.

*2. Jurisdictional agreements*

The Brussels Convention contains no provisions relating to jurisdiction or to the validity of jurisdictional agreements. The law of April 2, 1936, on the other hand, includes provisions regulating both the jurisdiction of the French courts and the validity of jurisdictional clauses.

Art. 10 of the law of April 2, 1936, declares that the general rules governing jurisdiction are applicable to bills of lading covered by that law. The plaintiff can thus bring action at the domicile of the defendant, at the place of his principal business establishment, at the place where the obligation was assumed or discharged, or at the place the freight was payable (Arts. 59 (1), 420, Code of Civil Procedure). The plaintiff may also take advantage of the law of April 6, 1932, which grants jurisdiction to the courts at the place where a contract for services is executed.[99] In addition to the general rules, Art. 10, 2nd paragraph, grants jurisdiction to the courts at the place of destination, if the latter is in France or in Algeria, and the suit is brought against the carrier by the shipper or consignee.

On the validity of jurisdictional clauses, note Art. 9 of the law of April 2, 1936, which provides that "any clause aiming at relieving the carrier, whether directly or indirectly, from liability which the common law or the present statute impose upon him . . . is null and void." This provision has been interpreted as forbidding jurisdictional clauses conferring jurisdiction on foreign courts, if these courts would apply to the case other law than the international Convention.[100] Apart from this prohibition, Art. 10, last paragraph, enacts that "with regard to the French reserved zone, any clause aiming at altering the place of litigation otherwise than as provided in this law shall be null and void."

Owing to the textual variations between the Brussels Convention and the law of April 2, 1936, the courts have reached different conclusions with regard to the validity of jurisdictional clauses, depending on the applicable text under the circumstances.

a. *Under the Brussels Convention.* It is settled that as to bills of lading covered by the Brussels Convention the general rules relating to jurisdiction are applicable, and that jurisdictional clauses inserted in such bills are generally valid.[101] The French courts giving effect

[99] See Sauvage, Manuel Pratique 120.

[100] See Marais, Les Transports Internationaux 126; Dor 28; De la Grassière, *supra* note 89 at 124.

[101] See Lyon-Caen et Renault, *op. cit. supra* note 18 at 796; Comm. Ct. Algiers, April 9, 1954, [1954] D.M.F. 686 (Denmark-Algeria; settlement in Denmark under Danish law); Comm. Ct. Algiers, May 2, 1950, [1951] D.M.F. 244 (settlement in Belgium under the law of that country); Paris Ct. of App., Oct. 31, 1952, [1954] D.M.F. 14 (Bordeaux-Dakar; settlement in Amsterdam under Dutch law); Comm. Ct. Havre, May 17, 1949, [1949] D.M.F. 38, *infra* note 102; Comm. Ct. Rouen, Nov. 7, 1955, [1957] D.M.F. 246

to jurisdictional clauses are not concerned with the question whether the foreign court will apply to the controversy the Brussels Convention or some other law.[102] This practice has been strongly criticized,[103] since the carrier, contrary to the spirit of Art. III (8) of the Convention (which forbids any clause lessening the liability of the carrier) may in most instances escape a liability attaching under the Convention.[104]

b. *Under the law of April 2, 1936.* In determining the validity of jurisdictional clauses inserted in bills of lading covered by the law of April 2, 1936, it is important to ascertain whether or not the carriage relates to the French reserved zone, namely to the French coastal trade or to the trade between France and Algeria.[105] If the carriage does not relate to the French reserved zone, the validity of jurisdictional clauses is governed by Art. 9 of the law of April 2, 1936,[106] and the clause is invalid only if it aims at relieving the carrier from liabilities attaching under the law.[107] On the other hand, if the carriage is within the French

(Morocco-France; settlement in Rotterdam under Dutch law); Comm. Ct. Algiers, Jan. 10, 1955, [1955] D.M.F. 549 (Holland-France; settlement in Holland under Dutch law). See also Comm. Ct. Marseille, July 5, 1949, [1950] D.M.F. 298; Comm. Ct. Algiers, June 29, 1951, [1952] D.M.F. 626; but *cf.* Comm. Ct. Rouen, Jan. 10, 1955, [1955] D.M.F. 545, *infra* note 103; Comm. Ct. Bordeaux, March 27, 1957, [1957] D.M.F. 617. The case involved a bill of lading issued by a Dutch carrier in Morocco, conferring exclusive jurisdiction on the courts of Amsterdam. The court upheld its validity since plaintiff failed to prove that Dutch law would "lessen" the liabilities of the carrier.

[102] See Comm. Ct. Havre, May 17, 1949, [1950] D.M.F. 38. A bill of lading issued in Havre for shipment to Rio de Janeiro provided for settlement in England under the law of that country. Another clause in the same bill of lading provided for a two-month period of limitation. The French court declined jurisdiction although the Convention was clearly applicable and the two-month period of limitation was forbidden by Art. III(8). As a result, plaintiff was relegated to the English courts, which, by enforcing the contract, would leave him without redress. The Convention is compulsory in England only with regard to "outward" bills of lading from the United Kingdom. See Knauth 471.

[103] See Marais, Les Transports Internationaux 126; Dor 28; De la Grassière, *supra* note 89 at 122. *Cf.* Comm. Ct. Rouen, Jan. 10, 1955, [1955] D.M.F. 545. The case involved a shipment from East Germany to France under bill of lading granting exclusive jurisdiction to the courts of U.S.S.R. The court declared the jurisdictional clause invalid relying partly on the ground that the Russian courts would not apply the Convention to the bill of lading in question.

[104] *Cf.* De la Grassière, *supra* note 89 at 122.

[105] See Marais 72; Sauvage, Manuel Pratique 121; De la Grassière, La navigation réservé et les clauses de compétence, [1954] D.M.F. 639. The term "reserved zone," and the question whether Tunis and Morocco are included therein, gave rise to conflicting adjudications. See Comm. Ct. Seine, Feb. 26, 1951, [1951] Rev. Trim. Dr. Comm. 273; Montpellier, Ct. of App., April 7, 1952, [1952] D.M.F. 380 (Tunis not reserved zone; jurisdictional clauses valid); Tunis Ct. of App., June 23, 1951, [1953] D.M.F. 52 (Tunis reserved zone; jurisdictional clause invalid). As to Morocco, see Aix Ct. of App., May 11, 1948, [1949] D.M.F. 65 (not reserved zone; jurisdictional clause valid).

[106] See *supra* text at note 100.

[107] See *supra* note 100; Marais, Les Transports Internationaux 126. But *cf.* Auburn 113; Scapel 64. Jurisdictional clauses were upheld in Comm. Ct. Algiers, Jan. 10, 1952, [1952] D.M.F. 623, aff'd, Algiers Ct. of App., May 11, 1954, [1955] D.M.F. 158; Comm. Ct. Marseille, Dec. 17, 1948, [1949] Rec. Comm. et Mar. 100; Comm. Ct. Algiers, Jan. 13, 1955, [1955] D.M.F. 496; Aix Ct. of App., May 11, 1948, [1949] D.M.F. 65; Montpellier

reserved zone, the prohibition of jurisdictional clauses seems to be absolute, and their validity no more depends on whether or not the carrier intended to relieve himself from liability. According to Art. 10, last paragraph, of the law of April 2, 1936,[108] any clause inserted into bills of lading covering carriage of goods within the reserved zone aiming at altering the place of litigation is null and void; and thus clauses granting jurisdiction to foreign courts or to French courts contrary to the provisions of Art. 10 are ineffective.[109]

### 3. *Arbitration clauses*

Arbitration clauses inserted in bills of lading covered by the Brussels Convention are generally valid, and are given effect irrespective of whether or not the carrier intended to escape his liabilities under the uniform rules.[110] Different standards, however, apply with regard to bills of lading covered by the law of April 2, 1936. As to such bills of lading distinction should be made according to whether or not the carriage of goods is within the French reserved zone.

In case the bill of lading covers carriage of goods outside the reserved zone, the validity of arbitration clauses is tested according to Art. 9, and such clauses are to be given effect where the carrier would not escape his liabilities under the uniform rules.[111] If, on the other hand, the carriage is within the reserved zone, arbitration clauses seem to be excluded by Art. 10 which declares null and void "any clause, including arbitration clauses, aiming at altering the place of litigation."[112]

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Ct. of App., April 7, 1952, [1952] D.M.F. 380; Comm. Ct. Seine, Feb. 26, 1951, [1951] Rev. Trim. Dr. Comm. 273. But *cf.* Comm. Ct. Marseille, March 23, 1956, [1957] D.M.F. 31 (Togo-Marseille; the court retained jurisdiction under the Code of Civil Procedure in spite of jurisdictional clause providing for settlement in Trieste or Genoa).

[108] See *supra* text at note 100.

[109] See Paris Ct. of App., May 8, 1952, [1953] D.M.F. 23; Comm. Ct. Marseille, April 21, 1950, [1950] Rec. Comm. et Mar. 46. See also Tunis Ct. of App., June 23, 1951, [1953] D.M.F. 52; Sauvage, Manuel Pratique 122, Auburn 113; Marais, Les Transports Internationaux 126.

[110] See Cass. May 3, 1957, [1957] D.M.F. 746 (bill of lading covered carriage of goods from the United States to France provided for arbitration in New York; held, jurisdiction should be declined); Sauvage, Manuel Pratique 124. But *cf.* Marais, Les Transports Internationaux 110. See also Comm. Ct. Rouen, Feb. 17, 1950, [1950] D.M.F. 552 (giving effect to a clause providing for arbitration in London; bill of lading issued in Buenos Aires for carriage to France aboard Swedish vessel); Marseille, Feb. 10, 1954, [1955] D.M.F. 104 (shipment of wheat from Turkey to France, under a bill of lading issued in England; clause providing for arbitration in London was held invalid on the ground that the shipper, a governmental agency, was not bound by such agreements according to the Code of Civil Procedure).

[111] *Cf. supra* text at note 107.

[112] Thus, in spite of a clause providing for arbitration, suit may be brought in a competent court under Art. 10 or under the Code of Civil Procedure. See Scapel 64; Dor 28. But *cf.* Sauvage, Manuel Pratique 126, who interprets this provision as simply meaning that arbitration must be held at the seat of a competent court and that stipulations for arbitration elsewhere are null and void.

## III. "Negligence" Clauses in Bills of Lading Outside the Scope of the Uniform Rules: Choice of Law

While contracts of affreightment regulated by,[113] and within the area of application of,[114] the law of April 2, 1936, and the Brussels Convention, are as a matter of law governed by the applicable text under the circumstances,[115] and no other choice of law is permissible, the liability incurred by the carrier under contracts of affreightment outside the scope of these two texts is determined according to the law referred to by the general conflicts rules.[116]

1. The wide delimitation of the area of application of both the law of April 2, 1936,[117] and the Brussels Convention,[118] left practically no room for the application of other law with regard to contracts which, though involving questions regulated by these texts, fall outside their area of application. In fact, application of other than uniform law is theoretically possible only in the rare case involving bills of lading issued in a non-signatory country among non-French citizens for the carriage of goods to a foreign country.[119] But no such case has been found; in all of the reported cases, the liability of the carrier was actually determined either under the Brussels Convention or the law of April 2, 1936.

2. It is thus with regard to contracts not regulated by the uniform rules, such as carriage under a charter-party,[120] exempted shipments,[121] or with regard to liability arising prior to the time of loading and following discharge,[122] that the general conflicts rules are frequently applied.[123] The liability of the carrier, and the validity of "negligence" clauses inserted in this category of contracts, will ordinarily be determined according to the law selected by the parties; and, in absence of agreement, according to a variety of choice of law rules.

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[113] See *supra* text at notes 27–30.
[114] See *supra* text at notes 34, 69, 83.
[115] See *supra* text at note 92.
[116] *Cf.* supra notes 90–92. See Sauvage 147.
[117] See *supra* text at note 76.
[118] See *supra* text at notes 69, 70.
[119] *Cf. supra* note 92.
[120] *Cf. supra* text at note 28.
[121] *Cf. supra* text at notes 29, 30.
[122] *Cf. supra* note 28.
[123] *Cf.* Delaume, Note, [1950] Rev. Cr. Dr. Int. Pr. 214, 215; Dubosc, *supra* note 35 at 215. At times, French law is applied to cases involving significant foreign contacts without reference to choice of law rules. See Comm. Ct. Bordeaux, Dec. 14, 1938, [1941] S. 2. 30. This case involved validity of exoneration clause inserted into a bill of lading issued in Brazil for carriage of goods to France. The court held the Convention inapplicable, and as the law of April 2, 1936, was not in force at the time of shipment, upheld the validity of the clause under the Commercial Code. See also Comm. Ct. Seine, March 6, 1953, [1953] D.M.F. 572 (Djakarta-Amsterdam); Marseille, Feb. 10, 1954, [1955] D.M.F. 104 (Turkey-France); Aix Ct. of App., April 17, 1956, [1958] D.M.F. 16 (Lagos-Marseille aboard Greek vessel). *Cf. supra* note 76.

(a) It is beyond the purpose of this paper to enter a discussion concerning the limits of the parties' autonomy to select the applicable law.[124] It suffices, perhaps, to notice that the French courts will ordinarily give effect to such a stipulation inserted into a bill of lading outside the scope of either the law of April 2, 1936, or the Brussels Convention.[125] No case has been found in which effect was given to a stipulation providing for the application of other than uniform law; nevertheless, it is almost certain that effect will be given to such a stipulation when the proper case will arise.[126]

In all of the reported cases the law selected by the parties was either the Convention itself,[127] or legislation incorporating the uniform rules into the national legal system,[128] and effect was generally given to the parties' intention. In a case decided by the Court of Appeals of Rouen,[129] and affirmed by the Court of Cassation,[130] the parties had stipulated the application of the Canadian Water Carriage of Goods Act, modelled on the Brussels Convention.[131] In that case a charter-party had been concluded in New York between the French Government and a Panamanian Corporation for the carriage of wheat from British Columbia to France, on a vessel flying the flag of Panama. No bill of lading seems to have been issued, and moreover, as Canada has not adhered to the Brussels Convention,[132] the uniform rules were not *proprio vigore* applicable. The court gave effect to the intention of the parties, and determined the liabilities of the carrier according to the

[124] The limits of the parties' autonomy to select the applicable law is the subject of great difference of opinion in various countries. See Yntema, "'Autonomy' in Choice of Law" 1 Am. J. Comp. L. (1952) 341; Falconbridge, Conflict of Laws 402, 406 [1954]. Substantial contacts with the law selected were apparent in: Le Havre, Sept. 5, 1952, [1953] D.M.F. 145; Rouen, June 11, 1948, [1950] D.M.F. 65; Cass. July 23, 1951, [1951] D.M.F. 533 (law of the place of shipment); Comm. Ct. Havre, May 2, 1950, [1951] D.M.F. 244 (national law of the carrier); Comm. Ct. Marseille, May 25, 1950, [1951] D.M.F. 245; Paris Ct. of App., Nov. 6, 1956, [1957] D.M.F. 89 (law of the flag).

[125] *Cf.* Dubosc, supra note 35 at 214; *supra* notes 93, 94.

[126] *Cf.* Sauvage, Manuel Pratique 132; Dubosc, *supra* note 35 at 214, 215.

[127] Comm. Ct. Seine, Feb. 28, 1956, [1957] D.M.F. 165 (Port St. Louis-Manakara; stamp referring to the Brussels Convention); Comm. Ct. Havre, Sept. 5, 1952, [1953] D.M.F. 145 (Havre-Montevideo; reference to the Brussels Convention as enacted at the place of shipment). The last case should be held subject to the Brussels Convention as a matter of law. *Cf. supra* text at notes 69, 70, 93.

[128] See Comm. Ct. Havre, May 2, 1950, [1951] D.M.F. 244 (Belgium); Comm. Ct. Marseille, May 25, 1950, [1951] D.M.F. 245 (England). Both cases should be held subject to the Brussels Convention as a matter of law. *Cf. supra* text at notes 69, 70. See also Comm. Ct. Seine, Feb. 22, 1957, [1957] D.M.F. 497 (Morocco-Rouen; applying Morocco Dahir of March 31, 1919, incorporating the uniform rules); Comm. Ct. Seine, Jan. 15, 1958, [1958] D.M.F. 227 (France-Casablanca; held, Morocco Dahir governs). But *cf.* Bordeaux Ct. of App., Nov. 5, 1957, [1958] D.M.F. 215 (Morocco-France; French law applicable).

[129] Rouen, June 11, 1948, [1950] D.M.F. 65.

[130] Cass. July 23, 1951, [1951] D.M.F. 533.

[131] See Colinvaux, The Carriage of Goods by Sea Act (1954) 156.

[132] See Knauth 153.

Canadian Act. In another case, the Court of Appeals of Paris gave effect to a clause providing for the application of the American Carriage of Goods by Sea Act, 1936, to a contract for the carriage of goods from Cuba to France, aboard an American vessel.[133]

Where the law of a certain country is stipulated,[134] and that law incorporates the uniform rules as to certain shipments only,[135] a problem of interpretation may arise as to whether or not the uniform rules apply to the bill of lading under consideration. Thus, according to the practice of the English courts, a clause providing for the application of "English" law,[136] or even for the application of the (British) Carriage of Goods by Sea Act, 1924,[137] does not necessarily import the uniform rules into the contract of affreightment. This problem has not been considered in France; where the parties incorporated a foreign Carriage of Goods by Sea Act,[138] or referred to the "law" of a country, either adhering to the Brussels Convention or having domestic legislation modelled therein,[139] the uniform rules were applied without regard as to whether or not the same case would be considered subject to the uniform rules by the courts of the country whose law was selected.[140]

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[133] Paris Ct. of App., Nov. 6, 1956 [1957] D.M.F. 89.

[134] The stipulation may be that "English" or "Belgian" law be applied; it may also be that the law of the "place of shipment," the law of the "place of destination," or that of the "flag" be applied. If the bill refers to "French" law, or to the law of the place of shipment, and this is in France, the Convention will be applied only if there is a conflict of "international interests"; the law of April 2, 1936, or the Commercial Code, in all other cases. See Dor 25; Le Havre, Sept. 5, 1952, [1953] D.M.F. 145, *supra* note 127.

[135] See Colinvaux, *op. cit. supra* note 131 at 111, 115.

[136] See Vita Food Products v. Unus Shipping Co., [1939] A.C. 277; Colinvaux, *op. cit. supra* note 131 at 114.

[137] See Carver, Carriage of Goods by Sea (1952) 170.

[138] See Rouen Ct. of App., March 6, 1952, [1952] D.M.F. 481; Comm. Ct. Seine, Jan. 21, 1952, [1952] D.M.F. 186; Paris Ct. of App., Nov. 6, 1956, [1957] D.M.F. 89 (United States Act); Rouen Ct. of App., June 11, 1948, [1950] D.M.F. 65 (Canadian Act).

[139] See cases, *supra* note 128. There is no problem as to bills of lading issued in a country which ratified or adhered to the Brussels Convention: quite apart from the stipulation, the Convention will be applied. *Cf. supra* text at notes 70, 90. But a problem arises where the uniform rules are incorporated into the legal system of a country not adhering to the Brussels Convention, as is the case with Canada and several other British Dominions. See Colinvaux, *op. cit. supra* note 128 at 153. Canada applies the uniform rules to "outward" shipments only; thus, in a contract providing for the application of "Canadian law," an English court would apply the uniform rules only as to "outward" shipments from Canada. On the contrary, it seems that a French court would apply the uniform rules in any case. *Cf.* Paris Ct. of App. Nov. 6, 1956, [1957] D.M.F. 89 (applying the United States Carriage of Goods by Sea Act to a shipment from Cuba to Havre). Comm. Ct. Marseille, May 25, 1950, [1951] D.M.F. 245. Another problem of interpretation may arise where a bill of lading refers to two different legal systems. See Comm. Ct. Seine, Feb. 28, 1956, [1957] D.M.F. 165 (stamp preferred to regular "clause paramount"). No cases have been found considering the effect of non-compliance with a clause paramount requirement, prevailing at the place of shipment.

[140] It is a different question where reference is made simply to the "applicable law." In such a case there is no stipulation of the applicable law, and localization is made by

(b) In absence of agreement with regard to the applicable law, the liability of the carrier, and the validity of clauses aiming at exonerating the carrier from liability, whether directly or indirectly,[141] will be determined, in principle, according to the law of the place of contracting.[142] The law of the place of destination may be considered as to the liability arising after the arrival of the goods at their port of destination;[143] and, under special circumstances, the contract may be localized according to a "center of gravity" theory.

Apparently on such a theory, French law was applied to a case involving a question of (formal) validity of bill of lading. The shipment was from Bermuda to France, under a bill of lading that had not been signed by the shipper. The carrier (the French Government), sought to establish the validity of the bill under the American law and, relying on a clause which made the freight payable "in any event," claimed from the shipper (also French) the payment of freight which had not been actually earned. The shipper alleged that French law governed the validity of the bill and that, under the Commercial Code, the bill was invalid; consequently, in the absence of agreement, freight was due only if earned. The court decided that the contract, "being a contract between Frenchmen, in France, for the carriage of goods to France," was governed by French law and denied the claim. Its decision, however, was based on the alternative ground that if American law governed, the carrier had failed to establish the fact that the shipper accepted and held the bill, a prerequisite to its validity under American law.[144]

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the court. *Cf.* Madagascar Ct. of App., March 17, 1952, [1952] D.M.F., *supra* note 56; text at note 98.

[141] *Cf. supra* text at note 89. The validity of such jurisdictional clauses has been tested under the *lex loci contractus:* Comm. Ct. Marseille, May 22, 1951, [1952] D.M.F. 321 (Turkey); the law of the *place of settlement:* Comm. Ct. Algiers, April 9, 1954, [1954] D.M.F. 686 (Denmark); the *"national" law* of the shipper: Comm. Ct. Rouen, Nov. 7, 1955, [1957] D.M.F. 246 (Morocco). In most instances, however, the validity of jurisdictional clauses was determined under the law of *the forum,* without reference to choice of law rules: Comm. Ct. Seine, March 6, 1953, [1953] D.M.F. 572 (Djakarta-Amsterdam; clause stipulating the settlement of disputes in Holland, under Dutch law, was denied effect on the ground that the bill of lading had not been signed by the shipper, in accordance with Art. 282 of the Commercial Code); Comm. Ct. Rouen, Jan. 10, 1955, [1955] D.M.F. 545 (Germany-France). *Cf.* Rabat Ct. of App., April 18, 1956, [1957] D.M.F. 443.

[142] See Dubosc, *supra* note 35 at 214, 215; Delaume, Note, [1950] Rev. Cr. Dr. Int. Pr. 211, 212; Sauvage 147; Comm. Ct. Seine, Feb. 22, 1957, [1957] D.M.F. 497 (Morocco-Rouen; law of the place of contracting governs); Comm. Ct. Havre, Feb. 12, 1951, [1951] D.M.F. 238. *Cf.* Comm. Ct. Havre, Sept. 16, 1953, [1954] D.M.F. 300.

[143] See Casablanca, Jan. 26, 1954, [1955] D.M.F. 51; Sauvage 147.

[144] Paris Ct. of App., Nov. 21, 1949, [1950] D.M.F. 179. The case has been explained on different grounds by Delaume, Note, [1950] Rev. Cr. Dr. Int. Pr. 212 (lex contractus). *Cf.* Note, [1951] Rev. Trim. Dr. Comm. 821 (common nationality). See also Bordeaux Ct. of App., Nov. 5, 1957, [1958] D.M.F. 215 (Morocco-France).

## Summary of Conclusions

1. Bills of lading issued in a signatory country (including France) are governed by the Brussels Convention, if there is a conflict of "international interests"; such a conflict exists in all contracts concluded between parties of different nationality or for the carriage of goods between the ports of two different countries. Bills of lading involving exclusively domestic French contacts, and bills of lading issued in non-signatory countries for the carriage of goods to French ports, are governed by the law of April 2, 1936. Both texts express the public policy of the forum and contrary stipulations relieving the carrier from liability for negligence are ineffective.

2. Both the Brussels Convention and the law of April 2, 1936, apply as a matter of law, and stipulations aiming at relieving the carrier from liability indirectly, by providing for the application of other law than the uniform rules, are invalid. The few decisions which purported to give effect to clauses stipulating the applicable law, applied in effect the same law which would be applied without the stipulation. Jurisdictional and arbitration clauses inserted into bills of lading covered by the Brussels Convention are given effect, irrespective of whether or not the carrier might thus escape liabilities attaching under the Convention. Similar clauses inserted into bills of lading covered by the law of April 2, 1936, seem to be invalid where the carriage is within the French reserved zone, and valid where the carriage is outside that zone, except where the carrier would indirectly escape liabilities imposed by that statute.

3. Bills of lading involving questions *not dealt with* in the uniform rules, shipments exempted, and liability for the time preceding loading and following discharge, are subject to the general conflicts rules, and the validity of exoneration clauses depends on the applicable law, be it the law selected by the parties, the law of the place of contracting, or the law appropriate to the contract in view of all the circumstances. No case has been found defining the applicable law to bills of lading involving questions *dealt with* in the uniform rules but *outside* the area of application of both the law of April 2, 1936, and the Brussels Convention, as where the bill of lading is issued in a non-signatory country for the carriage of goods to another non-signatory country.

IGNAZ SEIDL-HOHENVELDERN

# Communist Theories on Confiscation and Expropriation. Critical Comments[1]

The Communist-led[2] "Association Internationale des Juristes Démocrates" (AIJD) has devoted two congresses (Brussels, 1956[3] and Rome, 1957[4]) to the study of the international law of confiscation and expropriation.[5] Apart from some articles by Katzarov,[6] proceedings of these congresses are the only studies in any Western language[7] which permit some insight into Communist views on this vital problem of East-West relations. Although, in the name of co-existence,[8] care was taken to have the Western approach to this problem also presented to the participants,[9] the reports of the other lecturers are so much imbued by their belief in the correctness of Communist doctrine that they not only completely fail to conceive that possibly other points of view could also be held outside the Communist fold, but they even fail to accept facts as facts. It is the modest hope of the author in this article to dispel some of these factual misunderstandings.

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[1] For previous discussion by the author of the subject matter treated in this article, see "Bemerkungen zu kommunistischen Theorien über das Internationale Konfiskations- und Enteignungsrecht," 2 Internationales Recht und Diplomatie (1957) 327–341; also "Gedanken zur Studientagung über Nationalisationen (Rom 1957)," V Annales Universitatis Saraviensis (1956/7) 206–221.

[2] Regarding this Association, *cf.* Kabes-Sergot, Blueprint of Deception, Character and Record of the International Association of Democratic Lawyers (The Hague 1957).

[3] The papers and discussions were published under the title: "Travaux de la Commission de Droit International Privé du VI[e] Congrès de l'Association Internationale des Juristes Démocrates (Brussels 1956)." This publication is hereinafter referred to as "Travaux." "Neue Justiz" (1956) 421–25, contains a summary in German. *Cf.* also Sarraute's report in Clunet (1956) 886–897.

[4] Association Internationale des Juristes Démocrates, Journées d'Études sur les Nationalisations, Rome 4–5 May, 1957 (Brussels, 1957). This publication is hereinafter referred to as "Journées."

[5] See for general comments on this notion and the problems involved: Adriaanse, Confiscation in Private International Law (The Hague, 1956); Foighel, Nationalisation (London/Copenhagen, 1957); and Seidl-Hohenveldern, Internationales Konfiskations- und Enteignungsrecht (Tübingen, 1952).

[6] Katzarov, "Die Nationalisierung als Rechtsbegriff," Wirtschaft und Recht (Zürich, 1957) 133–148; *id.*, "La Propriété privée et le Droit International Public," Clunet (1957) 6–51.

[7] The forthcoming Festschrift für Janssen will contain an article by Schütte on this subject.

[8] Travaux, 3–4; Journées, 20, 43.

[9] Notably by Sarraute, Travaux, 36–46, Journées, 20–35; also by Vander Elst, Journées, 56–57.

## I. Basic Concepts

In the first place, certain observations are pertinent on the ethical and historical background of nationalizations. In support of his assertion that nationalization can never be an injustice, Bystricky[10] points out that time and again courts of justice, parliaments, and the world's greatest thinkers have held the interests of the individual subordinate to the common interest. I think Bystricky will agree that this was a commonly accepted line of reasoning in most systems of law long before Karl Marx. Katzarov believes in a transformation of man's basic conception of private ownership, which has become manifest only since the French revolution. He maintains, first, that the urges to acquire property and to associate with other human beings are the two innate instincts of mankind;[11] secondly, that only from 1789 onwards has this fundamental right of man to own property been curtailed more and more, until it has been reduced to the level of an ordinary right.[12] By this thesis Katzarov seeks to motivate[13] claims to extraterritorial recognition of nationalizations of a confiscatory nature.[14] He overlooks the fact that in Roman law there already were restrictions and abstractions of property for the common good.[15] In the course of history from Hammurabi to the French Revolution,[16] the concept of "private ownership" has by no means been an invariable as Katzarov maintains.[17] Since 1917, it is true, the world has witnessed curtailment and even annihilation of private property to an unprecedented extent, yet it may be doubted whether in fact our generation in this respect

[10] Journées, 50.

[11] Katzarov, Wirtschaft und Recht (1957) 135.

[12] Katzarov, Clunet (1957) 40.

[13] Clunet (1957) 44.

[14] Katzarov, Wirtschaft und Recht (1957) 146, 148, seeks to prove that nationalization and confiscation are not identical notions, because nationalization is not of a penal character. There are, however, serious objections to this view (*cf. infra* note 122). It is unnecessary, however, to deal with them here, because Katzarov overlooks the fact that even though he should be right, he would not have adduced a decisive argument against the ideas upheld by Western courts, which speak of foreign nationalization measures as "confiscations" and, because of the "confiscatory" nature of these measures, refuse to recognize their effect on property located in the state of the forum. According to the views held by these Western courts, the essence of "confiscation" is the taking of private property without compensation. In the parlance of these courts, the terms "nationalization without indemnity," "confiscatory nationalization," and "confiscation" are used indiscriminately. Even if one were to join Katzarov in regarding "nationalization without indemnity" not as synonymous with "confiscation," nevertheless the element of such nationalization, i.e., lack of compensation, which induces Western courts to withhold recognition, would remain. Acceptance of Katzarov's thesis might perhaps induce these courts to change their terminology, but not the substantive content of their decisions.

[15] D. 8, 6, 14, 1, Ernst Rabel, Grundzüge des römischen Privatrechts (Bâsle, 1955) 54.

[16] Rabel, *op. cit.*, 53–54; Conrad, 2 Deutsche Rechtsgeschichte (Karlsruhe, 1954) 565; Planitz, Deutsches Privatrecht (Vienna, 1948) 66 *ff.*

[17] Recht und Wirtschaft (1957) 142. In contrast, A. Schnitzer, 2 Handbuch des Internationalen Privatrechts (4th ed., Bâsle, 1958) 606.

is at a turning point. In the absence of proof that precisely at the present time a degeneration of men's innate instinct to acquire property has set in, I for my part believe that instead we are today going through a downward phase in the development of what the concept of "ownership" stands for, a development which in former days certainly also had its ups and downs—a view that Katzarov[18] rejects.

But whether we regard the contemporary reduction of the right to own property as a permanent feature or as a stage in an eternal up and down, one thing is certain. At the present stage of international society, any interference by a state with property "for the common good" can only justify such appropriation within the limits of the state. It seems unrealistic to use this argument, as Bystricky does,[19] also to support seizures of property situated outside the state concerned. The community for whose benefit the individual has to accept privation of his property can only be the state; in fact Bystricky himself accentuates the paramount role which international law assigns to the state.[20] It seems quite illusory to expect a foreign state to accept[21] an encroachment upon its sovereignty in the interest of supranational solidarity, if this involves surrender of assets in its territory for the benefit of a nationalizing foreign state.

It could finally be observed that the ideological peculiarity of communist nationalizations, to which Bystricky in particular refers,[22] will scarcely induce states that do not adhere to such ideology to accord favored treatment to such nationalizations. Bystricky does not himself indicate what form this special treatment is supposed to take. As the West does not know "social nationalization" as a special institution, the Western rules of nationalization will be correspondingly applied by Western states. This will be all the easier to defend, as Bystricky himself emphasizes that both kinds of nationalization have the same general characteristics.[23] Thus Benkö rightly challenged the value of this differentiation in the realm of private international law.[24]

## II. Problems of Public International Law

### 1. *The Right to Nationalize*

The basic question here is whether a state has the right to take property in its own territory, even if such property belong to foreigners.

[18] Clunet (1957) 50 *ff.*
[19] Journées, 50.
[20] Journées, 69.
[21] Journées, 50.
[22] Travaux, 18–19.
[23] Travaux, 19. Incidentally, Bystricky here furnishes arguments for those who, as in the article "L'Occident et les Nationalisations," Affaires Etrangères, No. 26 (1956), B 1–9, see in every nationalization, even where compensation is paid, a precedent for anti-property "social nationalizations."
[24] Travaux, 56.

Ironically enough, one of the very rare instances of a successful denial of such right is the attitude of the Soviet Union towards Austria's attempt to nationalize the Soviet-held Austrian oil fields in 1946.[25] In general, however, it may be observed that, apart from specific obligations among states to the contrary,[26] a state should have the basic right to nationalize[27] foreign as well as domestic property in its own territory, but only against payment of reasonable compensation.[28]

Whatever disputes there may exist concerning the duty to pay indemnity in such cases, I nonetheless have believed that there should be general agreement that the problems concerned are problems of international law. Therefore, it seems strange to see Bystricky deducing from the expression "Nationalization" that it is a national act which is subject to the internal laws of the state,[29] the more so as Bystricky himself has to admit on the same page that in such cases the state of which the injured foreigner is a national can assert a claim for protection which may give rise to international litigation.

Such conflicts are generally[30] not concerned with the lawfulness or unlawfulness of the expropriation itself, but with the right of the foreigner to compensation. Bystricky has clearly misunderstood the authors and courts of the West, whom he does not specify by name, who with

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[25] Rauscher, "Die Verstaatlichung in Österreich," Neue Wirtschaft (Vienna No. I/1949) 11–12.

[26] The unilateral, premature withdrawal of a concession which a state has granted to a private company by virtue of an agreement with that company, may be regrettable in view of the principle of *"pacta sunt servanda,"* but not, according to Foighel, *op. cit., supra* note 5, 73 *ff.*, contrary to international law.

[27] It is not believed that Kouatly's words (Journées, 12) that the right of a state to dispose of the property within its territory "takes priority over all other authority and all other law" should have been intended by their author to mean, that a state can to such extent thrust aside any barriers which international law may impose. If states could place themselves even above international law, the latter would become pointless. I deduce this restrictive interpretation of Kouatly's words from the fact that Kouatly himself weakens his assertion by adding that it should only be applicable "within the limits of necessity and justice."

[28] See below, p. 545, as well as Cassoni, "La Nazionalizzazione della Compagnia Universale del Canale Marittimo di Suez," Rivista del Diritto Commerciale (1957) 263. In connection with the nationalization of the Suez Canal Company, Vander Elst (Journées, 54–55) and indirectly also Nocera (Journées, 53) pointed out that in the light of the significance of the Suez Canal as a *"service public international"* this sovereign right of Egypt as a riparian State might be subjected to certain restrictions. *Cf.* Scelle, "La Nationalisation du Canal de Suez et le Droit International," Annuaire Français de Droit International 2 (1956) 7. Kouatly, on the other hand, maintains (Journées, p. 16) that the Suez Canal is a *"service public"* closely interconnected with the economic and political structure of Egypt, thus emphasizing its character as a *"service public égyptien."* At the same time, he submits as a justification of its nationalization, *inter alia,* that only through incessant pressure from international shipowners had the Suez Canal Company been willing to carry out improvements on the Canal. (Journées, 17). In doing so, he seems to admit that the users of the canal have a certain influence on its operation.

[29] Bystricky, Travaux, 19.

[30] *Cf. ibid.*

phrases such as "the nationalization of foreign property is only permissible against compensation" were not denying the state's right to nationalize, but were merely seeking to stress the right to indemnity.

What is the position with regard to this right? While one must agree with Bystricky that nowhere in the Universal Declaration of Human Rights of the United Nations can one read that nationalization without indemnity is a violation of human rights, the West will nevertheless be unable to follow him when he asserts that "exactly the opposite is true, since the object of nationalization is precisely the effectual safeguarding of human rights."[31] Moreover, as he himself has to admit, Resolution No. 626 of the VII[th] General Assembly of the United Nations does contain an allusion, even if hedged in by provisos, to a claim for indemnity.[32] Bystricky is finally mistaken when he says that the resolution of the Third Committee of the General Assembly of November 29, 1955, on the right of peoples to economic self-determination, is completely silent on the question of compensation.[33] For this resolution merely affirms the right of a state in principle to appropriate natural resources, without prejudice to its obligations under international law. I do not quite understand, moreover, how Bystricky[34] and Benkö[35] can deduce the existence of a rule of international law, according to which states are entitled to nationalize foreign property without compensation, from the fact that the Mexican government made such an assertion before the Second World War. Surely, they must themselves

[31] Also incorrect from the purely factual point of view is the conclusion which Ledermann, Traxaux, 51, seeks to draw from the fact that the 9th paragraph of the Preamble to the Constitution of the French Republic of September 29, 1946 (Peaslee, 2 Constitutions of Nations (New York, 1957) 6–51) provides for the nationalization of enterprises which have a *de facto* monopolistic character, without mentioning any right to compensation. One cannot conclude from this, as Ledermann does, that in these cases there is no obligation to pay compensation. For in the first paragraph of this Preamble, the French people solemnly reaffirm "the rights and liberties of Man and of the Citizen sanctified by the Declaration of Human Rights of 1789" and "proclaim further as especially necessary for our time the following . . . principles." Because of this reference to the Declaration of the Rights of Man and of the Citizen of 26th August, 1789, a specific reference to the obligation to pay compensation in the following 9th paragraph of the Preamble to the Constitution of September 29, 1946, was superfluous, since such a duty is firmly entrenched in article 17 of the Declaration of the Rights of Man and of the Citizen (Traumann, Sammlung von Gesetzestexten verfassungsrechtlichen Inhalts, (Stuttgart, 1950) 97).

[32] Travaux, 25. See on this resolution, H. W. Baade, Gesetzgebung zur Förderung ausländischer Kapitalanlagen (Frankfurt, 1957) 23–24, text *ibid.*, 34; Brandon, "Nationalization before the United Nations," in F. M. Joseph and others, On Nationalization, Reports submitted to the Fifth International Conference of the Legal Profession at Monte Carlo, 1954 (The Hague, 1954) 38–58; also Seidl-Hohenveldern, "Eigentumsschutz durch Resolutionen internationaler Organisationen," in the forthcoming Festschrift für Janssen (Heidelberg, 1958) and Foighel, *op. cit.*, 56.

[33] On this resolution, see Baade, *op. cit.*, 24; J. Hyde, "Permanent sovereignty over Natural Wealth and Resources," 50 Am. J. of International Law (1956) 854; also Seidl-Hohenveldern in Festschrift für Janssen.

[34] Travaux, 21.

[35] Travaux, 54.

admit that Mexico was unable to persist in this assertion, and that in fact these claims were dismissed by the joint arbitration commissions.[36] Nor am I any more convinced by the attempt to conclude, from the fact that many international treaties to which the United States is a party expressly provide for an indemnity obligation in the event of nationalization, that *a contrario* such right cannot exist under general international law.[37] Such provisions may at least equally well have a declaratory character.[38] Bystricky[39] himself, in support of his thesis that nationalization without compensation is permitted by international law, alleges *inter alia* that after each of the two World Wars various treaties between Western states confiscated the property of individuals without compensation and recognized such measures extraterritorially.[40] I would hesitate to conclude, *simply from these treaty provisions,* that therefore *a contrario* there was an indemnity obligation in general international law and that confiscation has no extraterritorial effect. Or would Bystricky, against the opinion of Lountz,[41] Wiemann,[42] and Gross,[43] agree with the assertion, which can be based on a similar *a contrario* conclusion, that the foreign trade delegations of the states of the Eastern block have no immunity under general international law[44] because in various agreements the immunity of these delegations has been expressly recognized?[45]

The authors quoted by Bystricky in support of his views likewise fail to convince. The reference to S. Friedman, *L'expropriation en droit international*[46] overlooks the serious objections that critics have levelled against this book.[47] Moreover, can one really maintain with

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[36] Benkö, Travaux, 54.

[37] Bystricky, Travaux, 22–23.

[38] Schwarzenberger, 1 International Law (London, 1957) 512.

[39] Bystricky, Travaux, 23.

[40] I do not know to what treaties Bystricky is alluding here. He speaks of "guarantee agreements." Unless he has in mind the completely isolated Roosevelt-Litvinov agreement of 1933 (Seidl-Hohenveldern, Internationales Konfiskations- und Enteignungsrecht," 142 *ff.*) this "extraterritorial effect" is evidently concerned only with recognition of the confiscation of assets which were located in the confiscating country at the time of confiscation (*cf. infra,* p. 556).

[41] Travaux, 11.

[42] Travaux, 66.

[43] Travaux, 73–74.

[44] On the solution of this problem, *vide infra,* p. 568 *ff.*

[45] *E.g.* the German-Soviet economic agreement of October 12, 1925, Reichsgesetzblatt 1926, II, 13; also the numerous further treaties cited by Stoupnitzky, Statut International de l'U.R.S.S., État commerçant (Paris, 1936) 376 *ff.*

[46] Bystricky, Travaux, 22.

[47] Review by R. R. Wilson in 48 Am. J. of International Law (1952) 755; also E. Lauterpacht's review of the English translation in British Yearbook of International Law 1953, 544, and my review of the same in 7 Österr. Zeitschrift f. öff. Recht (1955) 109–111.

Ross,[48] whom Bystricky quotes,[49] that it would be unrealistic to demand that in cases of nationalization a state should compensate foreigners even when it leaves its own nationals empty-handed.[50] On the contrary, a realistic way of looking at things cannot ignore the fact that in practice not only Western states[51] but also states of the Eastern block[52] have compensated foreigners even when their own nationals received little or no indemnity.[53] Bystricky himself mentions the practice of Lump Sum Indemnity Agreements. He would, it is true, envisage these as *ex gratia* payments by the Eastern block states without any legal obligation, but he admits at the same time that in such cases an offset of mutual claims has been involved.[54] He thus acknowledges indirectly that there is a certain justification in the claims of the other party to such Lump Sum Indemnity Agreements.

The authors who would deny a right to indemnification adduce contradictory reasons in support of their views. Whereas Katzarov[55] proceeds on the principle that originally aliens had such a right, a right which, as a result of the social revolutions since 1917 gradually has been

[48] A Textbook of International Law (London, 1947) 167. *Cf.* my review of the German translation in 4 Österr. Zeitschrift f. öff. Recht (1953) 359; also the review by Constantopoulos in 6 Jahrbuch für Internationales Recht (1955) 360.

[49] Travaux, 22.

[50] For equal treatment of foreigners and nationals in the sense that both can claim a minimum of protection of property, see Garcia Amador, Yearbook of the International Law Commission 1956, II, 199–203, *ibid.* 1957 II, 113 ff., 115.

[51] *E.g.*, the Swiss-French Agreement of November 21, 1949. On this see Bindschedler, Verstaatlichungsmassnahmen und Entschädigungspflicht nach Völkerrecht (Zürich, 1950) 65–66; *id.*, "La protection de la Propriété Privée en Droit International Public," 90 Recueil des Cours of the Hague Academy of International Law (1956 II) 179–306.

[52] *E.g.*, U.S.-Polish Agreement of October 27, 1946, and U.S.-Yugoslav Agreement of July 19, 1949. For text *cf.* Viénot, Les Nationalisations Étrangères et les Intérêts Français (Paris, 1953) 100–104 and 180–183. For further references see Bindschedler, *op. cit.;* Foighel, *op. cit.;* and Doman, "Postwar Nationalization of Foreign Property," 48 Columbia Law Review (1948) 1125–1161.

[53] Seidl-Hohenveldern, "Völkerrechtswidrige staatliche Eigentumseingriffe und deren Folgen," 53 Friedenswarte (1955) 6. Although one has to agree with Natoli, Journées, 41, that in cases of nationalization controversial questions of international law in regard to compensation can best be settled by intergovernmental negotiations (*cf.* also Bindschedler, *op. cit.*, 79 *ff.;* and Foighel, *op. cit.*, 98), Natoli errs when he holds that it follows that the powers of a state desirous of protecting the interests of its nationals effected by foreign nationalization measures should reach further than in the case of expropriation, where these powers are confined to diplomatic intervention. This diplomatic approach is a question of intergovernmental negotiations. Here, too, a state which intervenes on the principle of protecting its nationals may ultimately achieve results which, though in the general interest, do not, or only partially, accord with the wishes of those nationals. (*Cf.* Geck, "Der Anspruch des Staatsbürgers auf Schutz gegenüber dem Ausland nach deutschem Recht," 17 Zeitschrift für ausl. öff. Recht u. Völkerrecht (1957) 518.) Foighel, *op. cit.*, 101, raises the point whether a claimant should under his national law be entitled to damages from his own government which has inflicted on him an economic loss by concluding a lump sum agreement. According to Foighel, it might in practice prove difficult to produce the evidence required.

[54] Travaux, 26.

[55] Clunet (1957) 20.

eliminated, Natoli[56] on the other hand—as well as Friedmann[57]—believes that there is a tendency to award compensation, although according to their view there has been no general statutory obligation thus far to do so. Ultimately, both points of view seem to have been comprehensively superseded by actual practice. In fact, the president of the Rome Conference of the AIJD Finnochiaro-Aprile, in his summary of the results of the Conference,[58] very rightly pointed out that there was a consensus of opinion that practically in all instances compensation is awarded. Consequently, the declaration immediately preceding this statement, that international law knows no rule constituting liability to pay compensation, loses much of its significance.

### 2. *Methods of Assessing Compensation*

Whether understood with respect to the current practice of concluding Lump Sum Indemnity Agreements or to the payment of individual indemnities, the criteria according to which the indemnity should be calculated—either for direct payment or for serving as a basis of calculating the lump sum—must be determined. This aspect of the problem is discussed by Natoli,[59] who seeks to discriminate between expropriation and nationalization. Expropriation calls for just, effective and prompt indemnification, in his own words: full compensation of the loss incurred by the expropriated party, exemption from heavy taxes and exchange restrictions, and immediate payment of the total indemnification.[60] He maintains, however, that this liability shall not apply in cases of nationalization. Natoli tries to attain his result in a rather artificial way by attributing to the terms "just, effective, and prompt" when used in connection with nationalization, a meaning contrary to that of common parlance. It seems odd, as otherwise Natoli always asserts that nationalization is something new and revolutionary, that he does not simply state that these rules shall not be applicable to nationalization. Is it the purpose of this contradictable interpretation of the words "just, effective, and prompt" perhaps to defeat existing contractual obligations[61] in order to facilitate nationalization? If so,

[56] Journées, 36.

[57] Expropriation in International Law (London, 1953) 211.

[58] Journées, 73.

[59] In the case of expropriation, the right of property is not encroached upon for the purpose of comprehensive social reforms, but only for more limited purposes, although still in the public interest (e.g., road-widening). I do not quite follow why Natoli, in defining the two notions, asserts (Journées, 36) that there are no decisions, not even by courts of arbitration, relating to nationalization. Under his own definition, both the measures against German landowners in Polish Upper Silesia and the measures of land reform in Rumania after the First World War were nationalizations and not expropriations.

[60] Journées, 38.

[61] These words appear, e.g., in the Italo-U.S. Treaty of Friendship, Commerce and Navigation of February 2, 1948 (U.S. Treaties and Other International Acts Series,

then all those who, in reliance on the literal meaning of these promises may contemplate foreign investments, should be thankful for this warning. Up to a certain point, the rules which Natoli thinks should be applicable to nationalization coincide with the consideration discussed by the Institut de Droit International,[62] by virtue of which it should be possible, in case of nationalization, to deviate from the principle of "just, effective, and prompt compensation" by taking into account the paying capacity of the state resorting to nationalization.[63] I also have pointed out[64] that conceivably the capital exporting countries might be prepared to make allowances for the paying capacity of the capital investment countries, but only if—even apart from concrete treaty provisions—a fundamental enforceable liability to pay compensation in case of nationalization is recognized in exchange.[65]

It is, therefore, highly interesting to ascertain what Natoli himself means by these *"allowances."* He claims that, in assessing the amount of compensation, loss of future profits should not be taken into account[66] because such loss will be compensated only in case of unlawful or illegal measures. According to Natoli, however, nationalization is a sovereign act and therefore can never be unlawful or illegal. Natoli overlooks the fact that this argument would also apply to expropriation, where he favors full compensation, and that cases of "unlawful or illegal nationalization" are definitely conceivable, e.g., if a state resorts to nationalization in breach of an express previous promise, or in violation of its own constitution or other laws.

When it comes to determining *damnum emergens,* Natoli asserts that an alien may only claim compensation to an amount that is equivalent to the value of the confiscated undertaking as it appears on the balance sheet.[67] Presumably, this point of view would meet with strong opposition from the parties involved, because on fiscal grounds the

No. 1965); *cf.* R. R. Wilson, "Property Provisions in United States Commercial Treaties," 45 Am. J. of Int. Law (1951) 101. It may be noted in this context that Natoli is Italian.

[62] However, the Institute broke off discussions on this question without reaching any conclusion. Annuaire de l'Institut de Droit International 43 I (1950) 42–132; *id.,* 44 II (1952) 251–323. See comments by de Nova, "Völkerrechtliche Betrachtungen über Konfiskation und Enteignung," 52 Friedenswarte (1954) 116–141; Seidl-Hohenveldern, "Völkerrechtswidrige staatliche Eigentumseingriffe und deren Folgen," 53 Friedenswarte (1955) 1–27; Bystricky, Travaux, 16–17, 26.

[63] In the same sense, Foighel, *op. cit.,* 122; and Cassoni, *op. cit.,* 263; and the authorities therein cited.

[64] 53 Friedenswarte (1955) 9; Internationales Recht und Diplomatie 1957, 330.

[65] In this connection Foighel, *op. cit.,* 87, rightly points out that the payment of compensation—as a long-term policy—is also in the best interests of the nationalizing state, which will thus retain its creditworthiness.

[66] Foighel, *op. cit.,* 102, indicates that in several agreements concerning compensation for nationalization the loss of future profits has to some extent been taken into account, in that the market value of the undertaking, including the "goodwill," was taken as a basis. He concludes, however, that this has not been of much practical value.

[67] Journées, 39–40.

balance-sheet figures are often characterized by undervaluation. Nevertheless, I feel that it is not unjust to pin the owner down to his own prenationalization statements concerning the value of the assets, whether in the balance-sheet or in capital tax declaration, etc., but only on condition that the rules shall be applicable to both sides; in other words, the nationalizing state also will have to adhere to these rules and not—as Natoli proposes[68]—be able to choose between a valuation based on balance-sheet figures, or conformable to the market value,[69] or based on the company's investments, which would even allow the state not to pay any indemnity for investments which it regards as "unsuitable." Whatever criterion should finally be chosen, it should be equally applicable to the alien owner and to the state. Cases where the application of any such rigid standard might have unreasonable consequences could best be solved by letting an arbitration committee determine the value of the property.

In its compensation negotiations with Sweden, Poland tried to adopt another course by which to safeguard the interests of the state liable to pay compensation. Poland did not endeavor to reduce artificially the evaluation of each single object, but it expected Sweden to take into account the general depreciation of Poland's national wealth (approx. 40%) on account of World War II.[70]

Any statement to the effect that investing countries should be ready to consider taking into account the paying capacity of the "nationalizing state" when requesting an indemnity for nationalizations, however, may also be understood in a more restrictive sense. It may not indicate readiness of the investing country to abandon the principle of full compensation, but merely that the country concerned would not insist on the *prompt* payment of compensation but would be prepared to accept instalment payments. Like Natoli,[71] I consider this to be an acceptable proposition.[72] Moreover, it must be admitted that Natoli is right[73] in asserting that normal taxation of the compensation does not divest the compensation of its effective character, but on the other hand, that imposition of a special tax would produce this effect. This seems to me to be more or less a problem of accounting. Obviously, normal taxation of the compensation would be taken into account in

[68] Journées, 39–40.

[69] Foighel, *op. cit.*, 119, rightly points out that in the case of nationalization there can, as a rule, no longer be a "market value" for the property.

[70] Foighel, *op. cit.*, 118, believes this to be defensible, although Sweden took exception to this point of view.

[71] Journées, 40.

[72] Foighel holds the same view, *op. cit.*, 120; he believes, *op. cit.*, 85, that the granting of credits or commercial advantages to a debtor state within the scope of a lump sum agreement is not inconsistent with the idea of the fulfilment of a liability to pay compensation. He compares this practice with the assistance which in private business a creditor may render to a debtor whose financial position is not too firm.

[73] Journées, 41.

fixing the amount to be paid by the state. I deem this preferable to declaring such compensation to be tax-free, which would render a measure not too popular in itself even more unpopular in the country bound to pay. Natoli is right in advocating that the property should be evaluated on the basis of its value at the time of seizure.[74] Objections to this standpoint would be relevant only if, prior to nationalization, the state should have tried by various manipulations to depreciate the value of the undertaking in order to pay less compensation.[75]

Finally, the transfer question. In my opinion, a general transfer liability on the part of the state, opposed by Bystricky[76] and Natoli,[77] is not the proper solution. Apart from special intergovernmental agreements, there can be no transfer liability if the original investments were not in foreign currency and even if actually foreign exchange was invested, there is only the obligation to transfer the money in the relevant foreign exchange.[78] But even this obligation can be relinquished when the state in question opens up possibilities for reinvestment of the indemnity.[79] This would of course apply only to reinvestments offering equivalent chances of profits and security as the original investment. A possibility to "re-invest" the compensation in state bonds of more than doubtful market value could not be considered as equivalent.

In any case, it is impossible to assert, on the one hand, that compensation has been awarded to the investor and at the same time, by measures of the state liable for indemnity, deprive the investor of the benefit of this indemnity, although evidently according to Bystricky and Natoli this is within the range of possibilities.[80]

Kouatly[81] refers to the stipulations of the Egyptian law on the nationalization of the Suez Canal Company. According to these, the payment of indemnity should be conditional upon recognition of the seizure, by Egypt, of the Company's assets outside Egypt. In my opinion, this stipulation is not quite realistic.[82] In fact, if the indemnity which Egypt has in mind should be *below* the countervalue of the company's for-

[74] Journées, 40.
[75] Thus Foighel, *op. cit.*, 119.
[76] Journées, 63–64.
[77] Journées, 41.
[78] In this connection, it may be of interest that in August, 1957, India's minister of finance rejected a proposal to discontinue, because of India's shortage of foreign exchange, the provision of foreign currency for the remittance abroad of profits of foreign companies, observing that his government "was not contemplating any deviation from accepted international standards of business morality." International Monetary Fund, International Financial News Survey of September 6, 1957, 76; source: Financial Times (London, August 9, 1957). This concept would be similarly applicable to reimbursements of capital in cases of nationalization.
[79] In the same sense, see also Foighel, Nationalisationen, 124.
[80] Journées, 63–64, and 41, respectively.
[81] Journées, 18.
[82] Even more critical is Cassoni, *op. cit.*, 266, although on the whole he is rather favorably disposed towards the Egyptian thesis.

eign assets, any seizure of such assets by Egypt would be doomed to fail, even if the principle, according to which a state nationalizing against adequate compensation—a principle among others also once adopted by me—is entitled to nationalize the assets in other countries also,[83] would actually be generally adopted in Western jurisprudence.[84] In that case, the offer would be one of inadequate compensation. However, if the offer should exceed the value of the foreign assets, it would doubtless be more to the advantage of both parties to leave these assets to the shareholders and to pay the balance as indemnity.[85]

### 3. *Reactions of Other Countries against Nationalizations*

If the principles advanced above may be considered to govern the problem of nationalization under public international law,[86] there still remains the problem, whether the reactions that other countries may adopt in case of violations of these rules, are themselves compatible with international law.

We may start in this matter with Bystricky's[87] emphatic assertion of the state's right to nationalize property. As this right is to be regarded as a consequence of state sovereignty, it will hardly be challenged—except in the case of intergovernmental agreements to the contrary—as long as it is exercised within the territory of the state.[88] By the same token, however, the sovereignty of other states, reacting against a nationalization should be taken into consideration. Article 2, para. 3 and 4 of the United Nations Charter prohibits all acts of force and even any threat of force, but the leading commentators on the Charter[89] maintain that, whenever the term "force" is used in the Charter, refer-

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[83] Internationales Konfiskations- und Enteignungsrecht, 183 *ff.;* to the same effect Delson, "Nationalization of the Suez Canal Company," 57 Columbia Law Review (1957) 779.

[84] However, this is by no means the case. *Cf.* for example, Bank voor Handel en Scheepvaart N.V. v. Slatford [1953] 1 Q.B. 248; Clunet (1954) 126. It may therefore be necessary to revise my previous attitude.

[85] This appears to be the basis of the settlement arrived at between the shareholders of the Compagnie Universelle du Canal Maritime de Suez and the Egyptian Government in Rome on April 29, 1958, UN Doc A/3827—S4014; IMF International Financial News Survey X (1958) 356.

[86] For the private international law aspects, *cf. infra,* p. 555 ff.

[87] Journées, 42–51.

[88] So also Vice-President Nixon, commenting on the nationalization of the Suez Canal Company, at the same time pointed to the detrimental consequences of such measures on a country's credit. Nixon, "Private Investment and the Economic Challenge," U.S. Dept. of State, Bulletin XXXVII (1957) 706.

[89] Goodrich-Hambro, Charter of the United Nations (London, 1949) 104; Kelsen, The Law of the United Nations (New York, 1951) 365, 915; Wehberg, "L'interdiction du recours à la force. Le principe et les problèmes qui se posent," 78 Recueil des Cours de l'Académie de Droit International de la Haye (1951 I) 69. *Cf.* also Resolution No. 378 A (V) of the United Nations Assembly: "Reaffirming the Principles embodied in the Charter, which requires that the force of arms shall not be resorted to except in the common interest." Repertory of Practice of United Nations Organs I (1955) 27.

ence is made only to *military* force used against another state. Therefore, only military intervention or the threat of such intervention is contrary to the tenets of international law. This, however, is not the case in respect to other reactions to nationalization quoted by Bystricky, such as nonrecognition of the nationalizing government, discontinuance of diplomatic relations, freezing or even seizure of the accounts of the nationalizing country and its citizens, restrictions on or even discontinuance of mutual business relations, or repudiation of the seizure by the nationalizing state of assets outside its sphere of control.[90]

It should be observed that under international law no government can claim recognition[91] nor can a state claim continuation of diplomatic relations.[92] It would be an infringement on the sovereignty of other states, if they were to be forced in any way to establish or maintain such relations when for any reason they should be opposed to these relations. Moreover, the threat to take such measures would hardly induce a state determined to nationalize property to desist, because such measures would hardly affect the economic situation.[93]

Sequestration or seizure of the bank accounts of the nationalizing state or even of its subjects,[94] is a different matter. In some cases, the threat to resort to such measures will have considerable influence on the other state's intention to nationalize. However, if one recognizes the absolute right of Country A to seize properties within its own territory and even this country's right to seize, for its own public welfare, properties belonging to the subjects of Country B, then this same right has to be attributed to Country B, i.e., Country B's right to confiscate within its territory properties belonging to Country A and to the subjects of Country A. In that case, the nationalization would be in the public interest of State B, as undoubtedly the protection of the interests of the subjects of State B is a legitimate concern of the public welfare of State B.

As for decline of trade with the nationalizing country and the un-

[90] Foighel, *op. cit.*, 84; In his opinion, which I share, these reactions are not inconsistent with international law.

[91] Verdross, Völkerrecht (1955) 186. In the same sense, the majority of the members of the International Law Commission. Yearbook of the International Law Commission, 1949 p. 289. *Vide* their report of June 9, 1949, UN Doc A/925; Orfield-Re, Cases and Materials on International Law (Indianapolis, 1955) 112.

[92] Verdross, Völkerrecht (1955) 344.

[93] Although prior to 1933 the United States did not recognize the USSR, claims to property which had been nationalized in the USSR and subsequently came to the United States were dismissed by United States courts even before that time. *Cf.* Salimoff v. Vacuum Oil Co., 262 NY 220 (1933); Seidl-Hohenveldern, Internationales Konfiskations- und Enteignungsrecht, 19–22, agrees with this conclusion.

[94] Unless there are objections in principle to making the nationals of a state liable with their property for that state's actions. To this effect, Freise, Die Enteignung der privaten deutschen Auslandsguthaben im Spiegel des Völkerrechtes (Bremen, 1950) 13.

favorable repercussions on its foreign exchange on the world market,[95] in the Western world these things are, at least partially, outside the government's range of influence. In free trade countries, they are conditioned by industry and commerce. But even if encouraged by the state, they are to be regarded as governmental measures taken within the state's own territory and for the common good. Despite the text of the second paragraph of Resolution 626 (VII) of the General Assembly of the United Nations,[96] it cannot be maintained that any of the above-mentioned measures—with the exception of the use of force of arms or a threat that force of arms will be used—constitute an inadmissible interference in the affairs of the nationalizing state. Within its own territory, this state is of course free to effect as many nationalizations as it wishes. It will have to take into the bargain, however, that other states will also protect their public interests in their own territory, *in the same way and by similar measures.*

One more reaction to nationalization is not mentioned in Bystricky's enumeration,[97] viz. the effect of confiscations on subsequent applications for credit.[98] Not only does a country's credit go down practically to zero on account of such measures, but other credit-seeking countries too will soon become very much aware of the mistrust[99] which these measures have created among potential credit-givers. But as long as foreign capital will be needed to open up underdeveloped countries, it seems advisable to think of a way in which such mistrust could be eliminated—as well as the mistrust of the debtors, who in many instances become somewhat apprehensive of foreign capital, which at first they were so anxious to attract, because sometimes a credit grant may entail political influence on the part of the investor in the affairs of the country of investment.[100] Any mitigation of this mutual distrust would be a more valuable contribution towards co-existence than uncompromising adherence to one's own point of view.[101] Moreover, the larger the number of cases where the Soviet Union—and to a lesser extent Czechoslovakia as well—acts as credit-giver in countries outside the Soviet bloc, the less tension there will be on all fronts. In fact, either such credits really will be granted without political conditions but with the honest intention to aid underdeveloped countries—and in that case,

[95] Natoli, Journées, 41.
[96] *Cf. supra,* note 32.
[97] Journés, 44; *supra,* p. 553.
[98] See also note 62 above.
[99] Vander Elst, Journées, 54 points to this circumstance.
[100] Symptomatic for this attitude is Kouatly, Journées, 13.
[101] Katzarov's critical comments (Clunet 1957, 50) on resolutions in favor of private ownership adopted by international congresses, e.g., by the International Law Association in 1926, may be applied conversely to the results of the meetings of the AIJD, *viz.* that they may stimulate a certain development of the law without necessarily expressing present positive international law.

should not the Soviet credit-givers be afraid, like their capitalistic colleagues, that this investment, the equivalent of hard work performed by the people of the Soviet Union, will one day become the object of nationalization?[102] Or, on the other hand, the Soviet credit-giver deliberately will take this risk because he feels that the political advantages which he expects from such a credit grant will be ample compensation—but is it not true that in such case the credit-acquiring countries should fear this grasp for political influence as much as similar attempts by Western countries?

As regards the last item of Bystricky's complaint, even the repudiation of a state's confiscation measures by another state to the extent that such measures affect property only within the territory of the taking state could never be an encroachment on the principles of international law. At the most, one might doubt whether the above-mentioned reactions, although in themselves admissible under international law, would help to relieve international tension and whether in the long run a state's own economic possibilities might not be affected to the extent that the ill effects would exceed the benefits of such reactions.[103] Consequently, every country will have to attune its measures to the case on hand and consider which measures would give the best results in a particular case.

## III. Problems of Private International Law

The problem of the recognition or nonrecognition of title to property acquired by nationalization is more important in private international law than in public international law.[104] Before considering this question, a point of semantics must be clarified. Communist writers are apt to employ the concept of "extraterritorial effect," which is the determining factor in all rules concerning this problem, in two different senses. By this they understand, on the one hand, acceptance by other countries of the fact of nationalization in respect of an object which, at the time of nationalization, was located in the nationalizing

[102] *Cf.* the ban on nationalization which the USSR had inserted in the 1947 Peace Treaties with Rumania and Bulgaria, in order to protect its properties acquired in those countries. (Foighel, *op. cit.*, 67, 57); and also the fact that in the autumn of 1955 Yugoslavia and Hungary started negotiations respecting compensation for property nationalized in each other's countries. (Foighel, *op. cit.*, 87).

[103] On the advantages of this "strong policy," see in particular Abs, Der Schutz der wohlerworbenen Rechte im internationalen Verkehr als europäische Aufgabe (Heidelberg, 1956) 20; Langen, "Einige Überlegungen zu Hermann J. Abs' Schrift 'Der Schutz der wohlerworbenen Rechte im internationalen Verkehr als europäische Aufgabe'," Recht der Internationalen Wirtschaft (1957) 66–67; also Jaudon in Affaires Etrangères, No. 28 (1957) B 21 f. *Cf.* however, Seidl-Hohenveldern, Internationales Konfiskations- und Enteignungsrecht, 12, 53; and Friedenswarte (1955) 16, which raise some practical objections.

[104] In the latter case, no *legal* problems appear to exist, *cf. supra* and *infra* p. 565ff.

country, where this object is later taken abroad or where there are reflected effects of the nationalization[105] which have to be taken into account abroad. On the other hand, they also understand by the term the claim of the nationalizing state to appropriate, by means of its nationalization measures, even objects located outside its own territory. Because of this ambiguous terminology, Bystricky in particular falls a victim to numerous misunderstandings.[106]

### 1. *Assets Inside the Nationalizing Country at the Time of the Nationalization*

As regards acceptance of the nationalization of objects which, at the time of nationalization, are within the nationalizing country, the Western states gave proof of their desire for co-existence even before the Second World War by suppressing, in the interests of peaceful development of world trade (in which they admittedly were also themselves interested) the misgivings which they must have felt against the confiscatory nationalization measures of the Soviet Union. For it is not true that every acquisition of property which is lawful according to the law governing such acquisition must be recognized as lawful everywhere in the world. Thus, the acquisition of a slave—should such a purchase still be permissible in any country today—would in no wise be recognized as giving title in other countries. Such recognition would be contrary to the *"ordre public"* of the *"lex fori."* The court would be able to invoke *"ordre public,"* not because the institution of slavery is unknown to the *"lex fori,"* but because it is disapproved. The reason why so many countries, particularly France, refused to recognize confiscatory nationalizations by foreign powers before the Second World War[107] likewise lay in the disapproval of these measures by the sense of justice prevailing in those countries.[108] Even today, under special circumstances considerations like these can gain the upper hand over the grounds (desire for co-existence, respect for foreign acts of sovereignty) for accepting such nationalizations. To the writer it seems an unpleasant example of national egoism that *"ordre public"* should be disturbed only if the person affected by the nationalization is a national of the state in which the court is situated,[109] as sometimes happens in such cases.[110]

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[105] Drobnig, "Extraterritoriale Reflexwirkung ostzonaler Enteignungen," 18 Rabels Z. (1953) 686–689.

[106] *Vide infra,* note 129.

[107] The attitude of the French courts has since altered. *Cf.* Cour d'Appel, Paris, 2.12. 1950, Affaire Hardtmuth, Clunet (1952) 1200 (Sarraute, Travaux, 44, incidentally is mistaken in assuming that in this case compensation was paid to all the members of the company); Trib. Civ. Seine, 12.7.1954, Clunet (1955) 112 (Sarraute, Travaux, 42).

[108] Bystricky's polemic (Travaux, 33) against Niboyet to this extent tilts at windmills.

[109] Similarly, H. W. Baade, "Die Anerkennung im Ausland vollzogener Enteignungen," 3 Jahrbuch für Internationales Recht (1950/51) 140.

[110] Bystricky (Travaux, 29) is mistaken, however, when he thinks he recognizes

While, in general, such nationalization measures are recognized as giving title to property,[111] it must nevertheless be emphasized that a state which does not so react does not contravene any rule of international law. Full recognition of ownership of property acquired through "social nationalization" at any rate—at least *de lege lata*—is not a fundamental right under present-day public and private international law, as Lountz[112] maintains.

Property thus acquired can probably claim no greater protection than any other property—at least when, being in the hands of a third party, it is no longer protected by immunity. If, therefore, a judgment of another state should award such property to the former owner on grounds of *"ordre public,"* then according to the communists' own views this no more can constitute a contravention of international law than any other deprivation of property without compensation. This would be a case of the expropriators (or their successors) being themselves expropriated.[113]

It is, however, conceivable *de lege ferenda* that in the course of mutual concessions reliance on *"ordre public"* as an exception to the recognition of such nationalizations might be declared inadmissible. At all events, recognition of such acquisitions of property does not imply any renunciation on the part of the state whose nationals have been affected by nationalization measures without compensation of the right to assert its claims to compensation under international law through diplomatic channels.[114] What has been said here about direct recognition of such acquisitions of property also applies, *mutatis mutandis,*

national socialist thought in the *ratio decidendi* of the decision by the Munich Oberlandesgericht of 14.6.1951, Monatschrift für Deutsches Recht 1952, 425, Clunet (1954) 1012. The phrase, that "such confiscations, at least in the mutual relationship of the Germans affected by them," were not to be recognized, means only—as is clear from the sentence immediately following—that the court would not have been willing to order the successor to the Czechoslovakian State to return the items of equipment confiscated by the latter if he had been a foreigner. The judgment of the Munich Oberlandesgericht was in any case reversed by the Bundesgerichtshof—BGH 29.1.53, Neue Juristische Wochenschrift 1953, 545—even though on unsatisfactory grounds (*cf.* my comments in Neue Juristische Wochenschrift 1953, 1389–1390). The Federal Supreme Court held that it had to recognize this Czechoslovakian confiscation, not on the grounds of the principle of territoriality, but solely on the grounds of Allied High Commission Law No. 63. Now Bystricky himself confirms (Travaux, 28–29) that the seizure of the property of former Czech citizens of German nationality is not covered by Article 6 D of the Paris Reparations Agreement of 14.1.1946, Am. J. of Int. Law (1946) Off. Doc. pp. 117. From this, however, it must necessarily follow that these confiscations could not therefore constitute "measures" within the meaning of Allied High Commission Law No. 63 (Böhmer-Duden-Janssen, Deutsches Vermögen im Ausland (Cologne 1956) III, 58) although Bystricky evidently takes a different view.

[111] Sarraute, Travaux, 45.

[112] Travaux, 11.

[113] Baade, *op. cit.*, 135, and Lauterpacht, Annuaire de l'Institut de Droit International 44 II (1952) 287. Bystricky's complaint that the Western countries "want to rob the national enterprises of their assets abroad" (Travaux, 31) therefore lacks any moral justification.

[114] Seidl-Hohenveldern, Internationales Konfiskations- und Enteignungsrecht, 37.

to recognition of so-called reflected effects which arise out of this transfer of property, so long as they constitute no encroachment on assets situated outside the nationalizing state. There is a difference between recognizing the rights of disposition of managers appointed after nationalization with respect to assets taken abroad from the nationalized business *after* its nationalization, and recognizing the claims of such managers to have the disposal of assets which were transferred abroad *before* nationalization. In the first case, it is a necessary sequel to the recognition of the title to the property. I therefore share Bystricky's view[115] that, with regard to the recognition of such titles to property, it would be inappropriate to apply section 977b of the New York Civil Practice Act, concerning the appointment of liquidators for property in the United States belonging to nationalized companies, to assets brought to the United States by a nationalized company *after* nationalization. The second case, however, is concerned with what I too term the "extraterritorial effect" of a confiscation, namely, an attempt by the nationalizing state to implement its nationalization law by seizing assets which were not within its territory at the time of nationalization. This it cannot do.

### 2. *Assets Located Outside of the Nationalizing Country at the Time of Nationalization*

It seems obvious that any attempt by a nationalizing state to seize assets that at the time of nationalization were located in the territory of another state, constitutes a flagrant infringement of the sovereignty of the latter state.[116] Its sovereignty surely includes the right to decide the lawfulness of titles to property situated in its territory (principle of territoriality).[117] It is at all events at variance with current doctrine for Bystricky to assert[118] that the recognition of seizure by the nationalizing state is justified in international law by the principle of the "inviolability of the sphere of property of a foreign sovereign." This evidently refers to the principle of the immunity of property of a foreign state. If a foreign state merely claims as its property an object located in the same state as the court before which it asserts that claim, without having taken possession of the object, that foreign state enjoys no immunity in any litigation over that claim according to the prevailing doctrine.[119]

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[115] Travaux, 31.

[116] To this extent it is possible to agree with Wiemann (Travaux, 67) only in the first of the cases cited here, when he complains that western states judge the credentials of representatives of state foreign trading enterprises by the *"lex fori"* and not by the *"lex personalis."*

[117] Bystricky also upholds this principle (Travaux, 19) although in a different context.

[118] Travaux, 34.

[119] Haile Selassie v. Cable & Wireless Ltd. (No. 1) [1938] 1 Ch. 839, 847; concurring Seidl-Hohenveldern, Internationales Konfiskations- und Enteignungsrecht, 138.

Bystricky should surely rather support the principle of territoriality, since he demands practically limitless rights for every state to nationalize any assets situated in its territory. What would have been Bystricky's attitude had the Anglo-Iranian Oil Company, under threat of nationalization in 1951, moved its center of administration to London in order to have itself nationalized there *pro forma?* Would he have approved if Britain had demanded that Iran should respect the ensuing right of the British state to immunity for the property of the Company in Iran? Nonrecognition of such a seizure follows from the very concept of sovereignty. It is therefore superfluous and confusing when many courts seek to justify their refusal to allow such seizures not only on the grounds of the principle of territoriality but also by holding that such a recognition would be contrary to their own *"ordre public."*[120] *"Ordre public,"* after all, is merely a means to prevent the application of foreign laws which would otherwise be applicable.[121] That a state cannot itself enforce its laws in the territory of another state or compel enforcement by the state in which the property is situated follows logically from the concept of sovereignty. Such laws cannot therefore be applicable at all. This becomes especially clear with laws of a penal character, but is by no means confined to such cases.[122] The point is not so much whether or not another state must recognize a foreign country's public law,[123] but rather that its courts rightly refuse to become a

[120] While the decision of the Swiss Bundesgericht of February 2, 1954, Bundesgerichtsentscheidungen 80 II 53, 62, and 64 respectively, in Ammon v. Royal Dutch Company still adduced both these arguments in spite of their inherent contradiction, the same court in its decision of September 25, 1956, BGE 82 I 196, 203, in Vereinigte Carborundum- und Elektritwerke, Nationalunternehmen v. Eidgenössisches Amt für geistiges Eigentum, clearly differentiated between these two cases and dismissed an attempted appropriation of property located in Switzerland solely on the ground of the territoriality principle. The Court held that "the question of *'ordre public'* does not arise here." Similarly, the German Federal Supreme Court declared on February 18, 1957, Neue Juristische Wochenschrift (1957) 629, "in order to avoid misunderstandings," that the territoriality principle, according to which "no State makes itself the bailiff of another," has nothing to do with the enforcement of *ordre public.* Similarly, the Danish Vestre Landsret, June 25, 1953, Clunet (1954) 481.

[121] It therefore appears correct that the problem dealt with *supra,* (pp. 556 ff.) of states unwilling to give recognition, should have been solved by invoking *"ordre public."*

[122] For this reason, it need not be discussed here whether "social nationalizations" have a penal character. Bystricky (Travaux, 18) would dispute this except for isolated cases. Though the idea of inflicting a punishment may be far from the minds of the initiators of an act of nationalization, and though they may be contemplating only the advantages that they hope will thereby accrue to the general public, the individual will nevertheless always feel the seizure of his property without compensation to be a punishment, the more so since the communist social order does recognize private property, even though within very narrow limits. And who could deny that in the concept of the class struggle, and especially in the slogan "expropriation of the expropriators," there lies a certain retributive or penal element? "Social nationalizations" are surely to be understood as measures taken in the course of the class struggle.

[123] Wengler, "Über die Maxime von der Unanwendbarkeit ausländischer politischer Gesetze," I Internationales Recht und Diplomatie (1956) 205 *ff.,* is of the opinion that nowadays there is a tendency to recognize foreign penal, fiscal, and administrative laws,

foreign state's obedient servant. Even among friendly nations, this principle should apply.[124]

This shows that the territoriality principle is my starting-point and not, as Bystricky thinks,[125] the right of asylum. My standpoint is rather that strict adherence to the territoriality principle will have the effect that alien property situated in a country will be safe from the confiscatory measures of this alien's home country; in other words, that it will find asylum in the country where it is situated. To maintain, however, that refusal to recognize such confiscatory measures is founded on the right of the state where the properties are situated to grant asylum, is a confusion of cause and effect. Moreover, my book reflects my opposition to too far-reaching interpretations of the concept of "right of asylum."[126] It is only in support of arguments arising from the territoriality principle that I state in my book[127] that recognition of the seizure by a confiscating state of goods in another state would make the granting of political asylum to a political refugee a farce if the refugee's native country would have the right to require the country of asylum to recognize the seizure of the refugee's property and in this latter case would have the obligation literally to deprive the refugee of his last shirt for the benefit of his native country.[128]

In order to support his view that extraterritorial effect should be given to nationalizations, even in respect of assets situated outside the nationalizing country at the time of the nationalization, Bystricky[129] tries to quote decisions by courts of various countries. In doing so, he falls victim to his own inaccurate terminology. The decision of the Berlin Landgericht II of December 11, 1928, and the English decision in *Luther v. Sagor* are irrelevant, as they concern recognition of the confiscation of objects which at the time of confiscation had been in the confiscating state.[130] The same applies to the decision of the Cour

provided that the implementation of such laws is not only beneficial to the enacting state but is also indirectly in the interests of good international order and beneficial to the interests of other countries. In my opinion, these prerequisites would only in very rare instances be applicable to nationalization laws.

[124] *Cf.* Jansma's cogent criticism in regard to the Dutch decisions recognizing the Belgian measures of confiscation of property located in the Netherlands and belonging to Belgian collaborators. For more particulars, see Seidl-Hohenveldern, "Neue Entscheidungen über die Territorialität von Markenrechten," Österr. Juristen-Zeitung (1957) 85. In the same sense, *cf.* Sialelli, Clunet (1956) 692, dealing with a similar case in France.

[125] Journées, 48.

[126] Seidl-Hohenveldern, Internationales Konfiskations- und Enteignungsrecht, 15, n. 28, 183.

[127] *Op. cit.*, 66.

[128] Contrary to Bystricky's opinion, countries like Switzerland and Austria grant and have granted asylum to political refugees even when the regime from which the refugees had fled is not an enemy or potential enemy of the country granting asylum (Lenin, Béla Kun).

[129] Travaux, 31–33.

[130] Bystricky may also have misunderstood some of the decisions which he attacks

d'Appel in Paris of December 2, 1950, in the *Hardtmuth case,*[131] which Ledermann[132] cites as evidence for the extraterritorial effect of nationalization without compensation. The court in this case did not allow the seizure of the Paris business house by the Czechoslovak state in virtue of the territoriality principle, but did recognize the seizure of the firm's trade marks, since it had localized them in Czechoslovakia contrary to current doctrine.[133] The quotation from Roblot (Revue de Droit Social 1949, p. 49) incidentally had previously been cited in this shortened form in the expert opinion by Julliot de la Morandière,[134] who is repeatedly quoted by Ledermann,[135] though this shortened form gives the impression that Roblot on the whole supports the recognition of a seizure of company assets abroad by the nationalizing state. On the same page, however, Roblot stresses that his observations apply only to nationalizations with compensation,[136] and that nationalization of companies without compensation should be refused recognition. It is doubtless owing to a similar confusion that Bystricky adduces treaties between Western states as evidence for the recognition of extraterritorial seizure.[137] Absolutely astonishing, however, is Bystricky's claim[138] that the state in which the court is situated must tolerate such encroachments upon its sovereignty since the precedents are only con-

(*cf.* also note 42). Thus he cites (Travaux, 31) a Danish decision, Clunet (1954) 481, Rabels Z. (1955) 338, according to which a Danish court allegedly dismissed a claim by a Czech national enterprise for the release of a sum of money deposited with the court as payment for prewar deliveries, although the national enterprise had brought the claim "with the consent of the former owners." The decision referred to is that of the Vestre Landsret of June 25, 1953. According to the report in Clunet (1954) 481, the former owners only consented to the case being heard before the Danish court, but contested the right of action of the national enterprise. The reference to Rabels Z. (1955) 338, is based on a confusion of two cases. At that place there is a report on a similar case before the Netherlands courts in which the decision was equally unfavorable to the national enterprise. The Danish decision referred to is reported in Rabels Z. (1955) 511. According to this report, the object of the suit brought by the nationalized firm was "to obtain the consent of the former owners to the payment of the sum deposited in Denmark." There can therefore be no question of the former owners having consented to the nationalization, as might be supposed from the way Bystricky worded it.

[131] Clunet (1952) 1200.

[132] Travaux, 48.

[133] For further cases involving the same trademark "Hardtmuth," see Trib. Civ. Seine, October 8, 1956, note 169 *infra;* Bundesgericht (Swiss Federal Supreme Court) of March 15, 1955, Schweizerische Juristenzeitung 1955, 159; Handelsgericht of the Canton of Berne, March 29, 1957, Recht der Internationalen Wirtschaft (1957) 149, upheld by Bundesgericht on September 13, 1957, 83 II 312; also Bundesgericht, September 25, 1956, Bundesgerichtsentscheidungen 82 I 196 203; and Austrian Oberster Gerichtshof (Supreme Court) of 10.5.1950, SZ XXIII No. 143, Clunet (1950) 748, ILR (1950) No. 41 are to the same effect but involve other trade-marks.

[134] *Vide infra,* note 160.

[135] Travaux, 48.

[136] Roblot therefore shares the view I put forward *infra,* p. 565 *ff.*

[137] Travaux, 23, see also *supra,* note 40.

[138] Travaux, 18.

cerned with confiscation and expropriation and not "social nationalization." By far the majority of the precedents on which Western courts rely today in order to reject such seizures are in fact concerned with the nationalizations consequent upon the victory of the revolution in Russia in 1917. From that time onwards, there is an unbroken chain of similar decisions right up to the present day. It is therefore not compatible with the facts when Julliot de la Morandière, in his opinion which is cited approvingly by Ledermann,[139] but which the competent court rightly refused to follow,[140] varies this assertion by claiming that the precedents from the period before the Second World War are no longer conclusive at the present day. Sarraute's paper[141] alone quotes five decisions from the post-1945 period—and the list could be continued indefinitely.

As a further argument for the necessity of admitting such seizures, it is contended[142] that nationalization of companies involves a transfer of ownership of a complete property which must be effective wherever parts of this complete property are located. This is said to be desirable in the interests of uniform legal treatment. As an example to justify this claim, Julliot de la Morandière[143] points out that for similar reasons inheritances are treated as complete entities. But Lountz observed at the same Brussels Congress of the AIJD[144] that inheritances are by no means universally treated as complete entities in this sense, but only when treaties or the law of the state in which the property is situated so require. Under *these* conditions, the treating of an inheritance as a complete entity can of course be no violation of the sovereignty of the state in which the property is situated; this would, however, certainly be the case if a nationalizing state were to try to seize that part of the alleged complete entity which is situated in another state in violation of the legal system of that state.

Moreover, at least one of the arguments advanced by Bystricky[145] in favor of his views concerning the transfer of "complete properties" will hardly have the approval of all nationalizing states. He compares the foreign assets of a company to the accessories of an engine and, in doing so, comes to the conclusion that these accessories should share the fate of the main asset. Should he then not also be forced to agree to the proposition that an oil company with worldwide interests could re-

[139] Travaux, 52.

[140] Trib. Civ. Seine, October 8, 1956, Entreprise Nationale Tchéchoslovaque L. et C. Hardtmuth contre Société L. et C. Hardtmuth, Recht der Internationalen Wirtschaft (1957) 31.

[141] Travaux, 39, ns. 8, 86; 42, n. 20; 44, n. 26.

[142] Bystricky, Travaux, 32; Julliot de la Morandière as quoted by Ledermann, Travaux, 50.

[143] As quoted by Ledermann, Travaux, 50.

[144] Travaux, 9.

[145] Journées, 50.

gard its plants, etc. in one of the many countries where this company has its interests, as a part of this company's total assets, and that consequently these assets cannot be subjected to nationalization in this particular country, when the main assets of the company remain unaffected by such nationalization? Perhaps this consideration will make clear to the nationalizing states that an appeal to Julliot de la Morandière's theory according to which the totality of a company's assets and liabilities devolves on the nationalizing state, is contrary to practical experience which bases itself on the sovereignty of the state of the *rei sitae*.[146]

The encroachment on the sovereignty of the state in which the property is situated becomes especially clear in the wording chosen by Bystricky[147] for his claim to the recognition of such seizures:

> "Au point de vue économique aussi bien que juridique, il s'agissait de nationaliser les biens *faisant partie de la sphère de l'Etat nationalisant*. La nationalisation concernait tous les biens quels qu'ils fussent, objets, droits ou autres valeurs, et *se trouvant n'importe où*."[148]

Such an extension of the sphere of the nationalizing state into the territory of the state in which the property is situated will as a rule be felt by the latter to be a violation of its sovereignty and therefore not be tolerated.

It may be conceded that from an economic point of view it may be difficult to tear apart firms forming a single entity, as the principle of territoriality seems to demand. Relying on certain judicial decisions[149] rendered after the Second World War, I have tried to come out in favor of the recognition of a seizure by the nationalizing state, despite the implicit violation of the sovereignty of the state in which the *"forum rei"* is situated, only in those cases in which the nationalizing state pays suitable compensation, to the satisfaction of the state in which the property is situated, in respect of the items of property claimed in the latter state.

I held this to be desirable in the interests of worldwide economic coöperation,[150] but I would not go so far as to regard it a violation of

[146] Bystricky, Journées, 71 cites Julliot de la Morandière as an authority; compare, however, my objections to the latter's views *supra* p. 562; also Sarraute, Journées, 27.

[147] Travaux, 32.

[148] Italics supplied.

[149] Seidl-Hohenveldern, Internationales Konfiskations- und Enteignungsrecht, 182 *ff.*, 186 *ff.* On the Transandine case cited by Bystricky (Travaux, 33), the first point to be made is that it was solely concerned with a taking into possession by the state in order to safeguard the interests of the original owner. In the Domke quotation (Travaux, 33) incidentally, a printing error has crept in, which materially alters the sense. Instead of "conspiratory" it should read "confiscatory."

[150] As do Sarraute, Travaux, 45, and the authors cited in my article, "Probleme des Internationalen Konfiskations- und Enteignungsrechts," Clunet (1956) 388.

international law if a state were to insist on the integrity of its sovereignty even in such cases.[151] It should not be overlooked, that later decisions were no longer prepared to recognize this type of seizure even where suitable compensation was offered,[152] so that the view I have put forward has by no means been universally accepted.[153]

On the other hand, there is no contradiction between my views and the fact adduced by Bystricky[154] that, in spite of the payment of compensation within the framework of Lump Sum Indemnity Agreements, courts at times have refused to recognize a seizure by a foreign state of property situated in their territory. An indemnity agreement is by definition an agreement to make reparation for damage sustained. Until the conclusion of the agreement, the nationalization was indubitably confiscatory. Owing to its confiscatory nature up to that moment, it could not extend to assets abroad. The former owners therefore continued to enjoy ownership of these assets. Since thus no damage could have been sustained by them in respect of these assets, it seems only logical that indemnity agreements should include no compensation for these assets abroad.[155] It is admittedly conceivable that in the negotiations for a Lump Sum Indemnity Agreement the total balance sheet value, including the assets abroad, might be taken as a basis for the lump sum. If the sum accruing in this way to the individual former owner does indeed represent, in the opinion of the *forum rei,* a suitable compensation for the whole property, *including the assets abroad,* it would constitute an unjustified enrichment of the former owner, if the *forum rei* would still consider him to be the owner of such assets of the firm as are situated outside of the taking country. For these problems, however, it is relatively easy to find a solution which will satisfy both parties to future Lump Sum Indemnity Agreements. All that is needed is to establish by mutual consent, when negotiations are opened, whether or not it is intended to include the assets abroad. It would then depend on the answer to this question whether the total value of the firms or only the value of assets situated in the nationalizing state will be taken as the basis for the lump sum indemnity.

### 3. *Situs Problems*

Having thus shown the existence of a widespread practice of different treatment for assets according to whether, at the time of nationaliza-

[151] Bystricky, however, does so, Travaux, 34.

[152] Bank voor Handel en Scheepvaart N. V. v. Slatford [1953] 1 Q.B. 248, Clunet (1954) 126.

[153] *Cf. supra,* note 84.

[154] Travaux, 34.

[155] *Cf.,* for example, Kreisgericht (District Court) Wels (Austria) 5.6.1953 and Obergericht (Cantonal High Court) Zürich 27.11.1951, both cited in Betriebsberater 1953, 839, n. 33; Bezirksgericht (District Court) Horgen 8.1.1952, Schweizerische Juristen-Zeitung 1953, 347; Cour d'Appel Paris 2.12.1950, Clunet (1952) 1200, 1206.

tion, they were located inside or outside the nationalizing state, it only remains to discuss the problem which state is competent to decide the question of the *"situs rei"* in case of doubt. In my opinion, it follows from the concept of sovereignty that this definition can only be made by that state in whose territory an actual appropriation of corporeal assets is possible, or in the case of incorporeal assets, by the state which is protecting them and has moreover, in many cases, even granted the property right in question. Since the carrying out of the nationalization presupposes an actual power of disposition over the object claimed, it is not possible to apply automatically[156] in this field of public international law those rules which in private international law fictitiously localize assets in a state other than the one which in fact has the sole possibility of appropriating them. Bystricky[157] is therefore correct when he points out that here—especially in the question of the situs of shareholders' rights and trade mark rights in cases of nationalization without compensation[158]—Western courts give decisions which are at variance with their own private international law rules. This, however, is the inevitable consequence of the fact that a state will not apply fictions created by its own private international law, if its sovereignty might thereby be impaired.[159] It is not a question here of an arbitrary violation of the rules of private international law[160] but of the application of the special rules of public international law.

As to Bystricky's objections to the various attempts of Western courts to liquidate a foreign company's assets situated in their territories and, therefore, untouched by a nationalization measure adopted in the country of origin of the company, I agree with him on one point only, i.e., that it would be ridiculous to regard these assets as *bona vacantia*.[161] It is exactly on these grounds that Western courts regard those who, at least from an economic point of view, are the owners of the company's properties, also as the legal owners of these assets.[162]

### 4. *Evaluation of the Various Solutions*

If in this way, the idea of sovereignty affirms the competence of the state in which the appropriation of an object is possible to determine

[156] *Cf.* for example, Neumeyer, 4 Internationales Verwaltungsrecht (1936) 425.

[157] Travaux, 30.

[158] *Cf.* on this point, my articles in Clunet (1956) 416 *ff.* and "Die Spaltungstheorie im Falle der Konfiskation von Aktionärsrechten," 6 Jahrbuch für Internationales Recht (1956) 263–270.

[159] This idea was particularly clearly expressed in the decision of the Swiss Federal Supreme Court of September 25, 1956 (*vide supra,* note 120).

[160] Benkö, Travaux, 57, considers such departures to be arbitrary.

[161] Journées, 71.

[162] German Federal Court (Bundesgerichtshof) 11.7.1957 II ZR 226/56, Wertpapier-Mitteilungen, Part IV B, 1957, 995 *ff.*, Recht der Internationalen Wirtschaft 1957, 165, and my comments on this case, *ibid.*, 181.

the *situs* of that object for purposes of recognizing nationalizations without compensation, it follows that one must also admit the competence of the state in which the object is situated to define, according to its own legal tenets, whether the recognition of a foreign nationalization measure would constitute an application of foreign public law,[163] or whether such measures are of a penal nature.[164] For if this competence were to be left to the state which took those measures, that state would easily be able, by an efficacious choice of arbitrary pretexts, to interfere radically with the sovereign right of the state in which the property is situated to decide for itself on the legality of the acquisition of property located within its own territory. A reference to the camouflage of national socialist confiscation of Jewish property by the appointment of so-called "special administrators," who, despite all such artifices, were denied recognition almost unanimously throughout the world[165] on the grounds put forward here, should be sufficient to justify these rules. Respect *on both sides* for the sovereignty of the other state seems in fact to be the fundamental requirement for solving the problem of the recognition of extraterritorial effect in nationalizations without indemnity. This, Benkö[166] correctly recognizes when he points out that the principle of the inviolability of foreign state property might come into conflict with the principle of territoriality. It needs to be made clear here, however, that assets situated outside the nationalizing country at the time of the nationalization without compensation are, in the view of the country in which the property is situated, neither the property of the nationalizing state, nor even in its possession, but are merely—and as a rule unsuccessfully—claimed by it.[167]

If the conception of mutual respect for the principle of territoriality advocated here is adopted, it leads to the recognition of the transfer of property by virtue of nationalization without compensation in respect of assets which were in the nationalizing country at the time of the nationalization, except possibly in case of foreign-owned assets (on account of the violation of the international law rule recognizing a foreigner's right to indemnity in such cases), but does not lead to the recognition of the nationalization of assets where this condition is not fulfilled. If this conclusion is drawn from the sovereignty of states, then this disposes of the criticism levelled by Benkö[168] against the view put forward by Bystricky, namely that the latter's suggestion would operate one-sidedly to the advantage of the communist states and is therefore unworkable under the given economic conditions.[169]

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[163] For the contrary view, see Bystricky, Travaux, 32.
[164] For the contrary view, see Bystricky, Travaux, 31.
[165] Seidl-Hohenveldern, Internationales Konfiskations- und Enteignungsrecht, 73–74.
[166] Travaux, 57.
[167] *Cf. supra,* note 119.
[168] Travaux, 57.
[169] In spite of the criticisms voiced by Benkö, Travaux, 57, and even more so by

An interesting sidelight on these problems is provided by the following exchange of views amongst members of the AIJD. Sarraute[170] would have the French courts adopt the principle of territoriality as presently applied in Anglo-American jurisprudence,[171] a desire which appears to be nearing fulfilment.[172] On the other hand, Vander Elst[173] would like to have the French courts continue their practice of refusing recognition of foreign nationalizations on account of their incompatibility with French *ordre public,* irrespective of whether the object concerned was situated inside or outside of the nationalizing state at the time of the nationalization. According to Vander Elst, this practice is, at least for the moment, obviously less favorable to the nationalizing state than the application of the territoriality principle, but in days to come it might prove more beneficial to such states. Henceforth, a court of justice, in repudiating measures by a foreign state, according to him, would no longer be able to appeal to *"ordre public,"* as in all probability its own country would also have resorted to nationalizations. Thus, recognition of the extraterritorial effects of confiscations might be expected in the future. However, those who expect such a development overlook the fact that it is quite a different matter whether a state confiscates or nationalizes property inside its own territory or whether it concedes this right to another state.[174] Even if the judge of a state which has itself nationalized property without compensation can no longer assert that an infringement of private ownership is incompatible with its *ordre public,* he may, assuming that no principle of territoriality existed, nevertheless rely on the *ordre public* of his state as a basis for repudiation of foreign takings without indemnity if such takings are in breach of the sovereignty of his state.

In summary, one might say that the attitude of Western courts may make nationalizations more difficult and less profitable but that, on the other hand, this attitude is not contrary to the principles of international law, because it simply serves to preserve their state sovereignty.

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Sarraute, Travaux, 45, Lountz and Wiemann, [according to Sarraute, Clunet (1956) 893] both supported Bystricky's views.

[170] Journées, 21–24.

[171] These decisions are on the line of the principle mentioned in the last paragraph. The contrary decision of the Aden Court in the case of the tanker Rose-Mary (Anglo-Iranian Oil Co. v. Jaffrate, 1953) I W.L.R. 246, 47 Am. J. of Int. Law (1953) 325, remains an isolated case. In the case of Helbert Wagg & Co. Ltd. [1956] I A.E.R. 129, the views adopted in the "Rose-Mary" case were at any rate not followed. *Cf.* Dunbar, Journées, 58–59; also Seidl-Hohenveldern, Jahrbuch für Internationales Recht (1957) 368–389.

[172] Sarraute, Journées, 25, specifically quotes the case of the Picasso pictures, Trib. Civ. Seine (Réf.) 12.7.1954, Clunet (1955) 118; and the Hardtmuth case, Cour d'Appel Paris 2.12.1950, Clunet (1952) 1200.

[173] Journées, 57.

[174] The same applies to Bystricky's complaint (Journées, 49) that Western courts treat nationalizing foreign states worse than their own country in cases where the latter has taken similar action.

## IV. Immunity

There remains one more problem to be discussed which has a more or less direct bearing on the problem of confiscations, the problem of the immunity of state property. In order to dispel any misunderstanding, it should first of all be pointed out once more that a state cannot enjoy immunity abroad in respect of assets located there merely by claiming those assets.[175] But according to current theory, a state today no longer enjoys full immunity even in respect of assets owned by it and in its possession. This is because an increasing number of states have adopted the practice of granting immunity to foreign states only for their sovereign acts but not for *acta jure gestionis*. Wiemann[176] in particular opposes this practice. He points out first of all that great states like Britain, Germany, and the United States do not follow this rule. It has evidently escaped his notice that the United States and the German Federal Republic have now adopted this practice,[177] so that now only Great Britain keeps rigidly to the old rule.[178] He overlooks the fact that this question also has been of concern to the Institut de Droit International, upon whose authority Bystricky so firmly relies in order to justify a reduction of the obligation to pay compensation.[179] However, while the Institute's studies on nationalization were broken off without any results, the Institute did on April 30, 1954, adopt a resolution,[180] explicitly approving this new practice, on the question of the immunity of states. Although Gross[181] puts forward the view that this distinction could not be applied to communist states taking part in world trade, if only because the latter consider such state activity as a sovereign act, the resolution explicitly emphasizes (Art. 3) that it is for the state of venue to decide according to its own law whether concrete acts of a foreign state shall rank as *acta iure imperii* or as *acta iure gestionis*.

Sociologically, the new rule can be explained by the new phenomenon of the state engaging in trade for the sake of gain and not, in the last analysis, for the attainment of ends generally regarded as being of a sovereign nature (such as the provisioning of an army).

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[175] *Vide supra,* note 119.

[176] Travaux, 65–66, similarly Knapp, Travaux, 69.

[177] Bishop, "New United States Policy Limiting Sovereign Immunity," 47 Am. J. of International Law (1953) 93–94; also Schwenk, "'Ausschluss fremder Staaten von der deutschen Gerichtsbarkeit," Neue Juristische Wochenschrift (1954) 1596. The Oberlandesgericht at Brunswick, 27.10.1953, in Rundschreiben des Ausschusses zonenmässig getrennter Betriebe No. 171/781, likewise shows a tendency favorable to the principle of functional immunity.

[178] Honig, "Die Immunität ausländischer Staaten gegenüber der englischen Gerichtsbarkeit," Annales Universitatis Saraviensis (1957) 90 *ff.*

[179] Travaux, 16–17.

[180] Annuaire de l'Institut de Droit International 45 II (1954) 293 *ff.*

[181] Travaux, 73–74. For the opposite view Seidl-Hohenveldern, "Commercial Arbitration and State Immunity," International Trade Arbitration (New York, 1958) 87–88.

As a reaction to the spread of this new state activity the number of adherents to the new rule has steadily grown.[182] Knapp's reliance on the Peace Treaties of 1918 (from which, incidentally he can only draw an *a contrario* conclusion) and on League of Nations documents of 1926, has therefore only a very problematical value as evidence at the present day.[183] On the other hand, a realistic appraisal should not lose sight of the fact that, provided certain assurances have been given, the loss of immunity in respect of the trading activities of the trading state may even be of distinct advantage to the latter. For such a state gains thereby in creditworthiness, facilitates the flow of business with its trade partners, and in the eyes of its private competitors no longer incurs the odium attaching to privileged treatment.

For these reasons, even the states of the Eastern block, in spite of their adherence in theory to the principle of absolute immunity in practice, in many cases do not insist on such immunity within the framework of their trade relations.[184] Here, admittedly, it should be noted that the effect of such a renunciation would be completely nullified if a state enterprise in such a case had still to remain subject in all respects solely to the law of its own state even when operating abroad.[185] Such a privilege would be incompatible with the sovereignty of the state of the *situs rei,* which, once immunity has been renounced (or in the event of nonrecognition of the principle of absolute immunity), should come into full operation. The nonadmission of judicial executions in respect of such state property would also run counter to the above-mentioned aims which it is hoped to achieve by waiving immunity. For this reason, Article 5 of the above resolution of the Institut de Droit International also declared judicial executions against state property within the framework of the economic activities of a state to be permissible.[186] There seems, however, to be little point in going too deeply into these theoretical issues, since in practice there is generally no invocation of immunity; for practical purposes it is immaterial whether this is the result of a renunciation of the application of absolute immunity or whether it is based on the new rule of functional immunity.

[182] Lemonon, "L'immunité de jurisdiction et d'exécution forcée des États étrangers," Annuaire de l'Institut de Droit International 44 I (1952) 13 *ff.*

[183] Travaux, 68–69, Knapp also refers, *inter alia,* to Article 2 of the Additional Protocol, annexed to the O.E.E.C. Convention on the Privileges and Immunities of the Organization. But the article he quotes is concerned, not with the substantive extent of the immunities, but only with their territorial extent.

[184] Knapp, Travaux, 71; Wiemann, 66.

[185] This is what Wiemann demands, Travaux, 66.

[186] In practice the Western states nevertheless to some extent hesitate to draw this logical conclusion. *Cf.* for example, Landesgericht Vienna, 6.11.52, Oesterreichische Juristenzeitung (1953) EvBl. No. 18, International Law Reports (1952) No. 44. For the admissibility of judicial execution if the debt is closely connected with the Swiss legal system, see Swiss Federal Supreme Court of 6.6.1956, BGE 82 I 75, in Royaume de Grèce contre Banque Julius Bär & Cie.

But for all that, the existence of two different theoretical views as to the meaning of immunity is inconvenient. It would appear in this connection, that it is due in no small measure to certain misapprehensions as to the limits of functional immunity that the states of the Eastern block see fit to cling in principle to absolute immunity. A substantial factor giving rise to these misapprehensions has admittedly been a number of court decisions, which should no longer be considered valid precedents. Thus Wiemann's misgivings[187] seem to me to be baseless when he suggests that Western states might not recognize the legal personality of communist state enterprises because their own legal system makes no provision for a similar form of enterprise. It is sufficient here to point out with Wiemann, that the forms of legal persons vary also in Western countries; however, this does not prevent mutual recognition of the legal personality even of legal persons of a type unknown to the law of the country granting recognition.[188] From the recognition of the independent legal personality of such state enterprises, it necessarily follows[189] that they can only be liable for their own obligations and not for the obligations of other state corporations[190] or even for damages claimed under international law against their home state.[191] This respect for the difference between the legal personality of an enterprise and that of its sole owner, the foreign state, is, of course based on the assumption that the state will not abuse the independent legal personality of the enterprise.[192] If it did this, for example by relying on the fact of separate legal personality in order to avoid paying the commercial debts of the enterprise, then the state of the venue would probably be entitled to lift the veil of the company and hold the single shareholder liable, as would be done in a similar case where a private person had been guilty of such acts. Gross[193] is probably correct, however, when he suggests that it would be absolutely impossible for a state to allow one of its state enterprises to become insolvent. In case of need, the state concerned will always advance the amounts required so that in practice no disadvantages can arise for creditors from the recognition of the special legal personality of state enterprises.

The foregoing survey shows how widely the ideas of Communist and

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[187] Travaux, 64.

[188] *E.g.*, recognition of the legal personality of a Liechtenstein trust in Austria. Austrian Supreme Court, February 26, 1952, Entscheidungen des Österr. OGH in Zivil- und Justizverwaltungssachen SZ XXV (1952) No. 48.

[189] Similarly Knapp, Travaux, 70–71; Gross *ibid*, 75.

[190] As Knapp correctly contends, Travaux, 71.

[191] I reject the contrary view of the Trib. Civ. Seine 12.1.1940, Représentation commerciale de l'U.R.S.S.c. Société Française Industrielle des Pétroles (Groupe Malopolska) Ann. Dig. (1938–1940) No. 83. See on this point Seidl-Hohenveldern, Internationales Konfiskations- und Enteignungsrecht, 32.

[192] See, in this sense, Swiss Federal Supreme Court 10.5.1950, BGE 76 III, 60, 69, in Karrer & Cie v. Narodowy Bank Polski.

[193] Travaux, 75.

Western states still diverge from one another. I hope that this article will at least succeed in correcting mistaken impressions about the Western attitude and in removing certain misunderstandings of a purely factual nature. My intention is not, however, to unleash polemics for their own sake but rather to voice the perhaps presumptuous hope that, given continued desire on both sides to reach an understanding in principle, such discussions may achieve, if not a rapprochement of the basic standpoints, at least a softening of the sharper contrasts, for *"tout savoir, ç'est tout comprendre."*

# Comments

## THE CONSEIL d'ÉTAT IN BELGIUM

### I. Introduction

*General Background.* Ten years are a very short span in the life of a legal institution. Compared to the more than one hundred and fifty years of the French Conseil d'État,[1] the Belgian Conseil d'État is just emerging from infancy to face the conflicts of adolescence. Yet, in the brief period of its existence, the Conseil d'Etat has become in Belgium a very important element in the fabric of administrative justice.

It was not until the law of December 23, 1946, that the Belgian Conseil d'État,[2] a consultative authority as well as an administrative court, was created. It came into factual existence in 1948.[3] Previously, in a few instances, public administrative authorities could be held responsible for acts in connection with their official activities by the regular courts. The greater part of the activities of public administration, however, were not subject to any judicial control. As a result of Montesquieu's idea of separation of powers, and its strict interpretation, Locke's idea of judicial supremacy was nonexistent. Most authors describe as "administrative" those matters that are neither legislative nor judicial. The determination what any one of the three categories is to include, in the Belgian system, is made by the legislature. Although the Constitution[4] provides some guiding principles in these matters (see *infra*), the legislator wields the supreme power. No judicial review exists. There is no legal machinery for annulling unconstitutional enactments or for rendering them of no effect.

Strictly speaking, under the maxim *ubi ius ibi remedium,* the Belgian Constitution, as Dicey aptly remarked, is not in reality the supreme law of the land, since the constitutional rules are not rules which in the last resort will be enforced by the courts. Their true character is that of maxims of political morality, which derive whatever strength they possess from being formally inscribed in the Constitution and from the resulting support of public opinion. In Belgium we face the fact that there are no restrictions on Parliamentary authority except moral or political sentiment. There are no legal means whatsoever for invalidating laws[5] which diminish or do away with the rights 'guaranteed' to our citizens. In theory, such an act

[1] The French Conseil d'État was inaugurated by Napoleon on 4 Nivôse an VIII (1799). Napoleon based his *Conseil* on a pre-Revolutionary pattern.

[2] The Dutch term is "Raad van State." It is to be noted (this is ignored by Peaslee in his 1956 edition of the Constitutions of the Nations) that the law of April 18, 1898, has put on the same footing the French and the Dutch text of the laws thereafter enacted. Contrary to the Anglo-American system where publication is not a part of the process of enactment, no Belgian law shall be in force unless it is published in the Moniteur Belge/Belgisch Staatsblad.

[3] On August 23, 1948, by executive decree of the Regent of August 21, 1948.

[4] The Belgian Constitution dates from February 7, 1831.

[5] Law is here to be understood as 'act of Parliament,' legislative act. Under Article 107 of the Constitution, the courts are authorized to pass upon the legality of executive

of Parliament (opposed to any article of the Constitution) is void, but during the whole period of our political independence no tribunal or court has ever pronounced judgement upon the constitutionality of an act of Parliament, although every Belgian jurist recognizes that there are some cases where Parliament did not respect the plain meaning of the Constitution.[6]

After Parliament had discussed for more than a century the desirability of a Conseil d'État, the legislator of 1946 took a final decision. According to the law of 1946, the Belgian Conseil is composed of two sections. The legislative section (*Section de Législation*) has only consultative powers:[7] this section acts as an advisory board to the executive on draft bills of the legislature, on drafts of executive decrees and other rules and regulations of a general character. This section primarily advises the government in administrative matters.

The administrative section (*Section d'Administration*) has advisory and jurisdictional powers, though it must be emphasized that the Conseil belongs wholly and entirely to the executive. This section functions as the highest administrative tribunal, and hence this Court is not a court in the normal sense, that is to say, a tribunal in the ordinary hierarchy of tribunals, but a special court, with a double function and face (advisor of the government and judge of the administration). This extraordinary paradox, which is the essence of the matter, is precisely the same as in the French counterpart.

*Legislative History of the Conseil d'État.* The Belgian revolution of 1830 was a revolution against Holland. This is a fact of primary importance, for it explains why our constitutional lawmaker was so deeply concerned with giving guarantees against the executive power. The Council of State of Holland grew into a slavish instrument of the absolute monarchy, and the liberal founding fathers of our state did not mention this institution at all. This silence however did not mean that they looked upon the Conseil d'État as an institution incompatible with a democratic form of government.

As early as 1832 a bill was introduced[8] to create a Belgian Council of State, and in the course of the 19th century the same idea was put forward a number of times.[9] All these bills were inspired by the desire to improve the technique of our legislation. Sometimes an allusion was made to jurisdictional powers,[10] but this idea met no approval.

In 1921, when our Constitution was revised, the government, after long debates, declared that it would not oppose a bill which would introduce an

decrees and ordinances, whether general, provincial, or local. Under Article 138 of the Constitution, the judiciary is competent to pass upon the constitutionality of all laws, decrees, orders, regulations, and other instruments that were enacted before the Constitution came into effect.

[6] We refer especially to the so-called "special legislation" in the years before the outbreak of the second World War. On all fours at variance with the mandatory text of the Constitution (Article 110), Parliament "authorized" the King to levy taxes.

[7] In no case delivering judgments.

[8] By Senator Degorge-Legrand.

[9] In 1833 by Minister Charles Rogier, in 1834 by Senator Duval de Beaulieu, in 1853 again by Rogier, and in 1855 by Senator d'Anethan.

[10] *E.g.* in 1833 by de Theux.

administrative court. In the meantime, our Supreme Court (la Cour de Cassation) delivered a very important judgment.[11]

Up to that decision the so-called *imperium* doctrine was generally accepted: the state, acting as *"puissance publique souveraine"* was immune from tort liability. Since 1920, the regular courts have had the authority, developed by case law, to award damages against the state or other public authority and thus to satisfy the claim of a citizen who proves that his civil rights have been encroached upon by an administrative act.[12] However, the regular courts were—and still are—not in a position to annul the administrative decision of which it disapproved; the power to set aside *erga omnes* the unlawful administrative act is the privilege of the administrative section of the Conseil d'État, as introduced in 1946.

In 1934 King Albert sent a letter to the Prime Minister[13] encouraging the creation of a supreme administrative court. This Royal action was extremely important and led to a number of studies. The four Belgian law schools and the 'Centre d'Étude pour la Réforme de l'État' were proponents of the Royal recommendation, and in 1936 a bill was submitted by Carton de Wiart.

Parliament discussed this bill from 1936 to 1939 and took it up again in 1945. On December 11, 1946, following the unanimous vote of Parliament, the Belgian Conseil d'État became a living reality.

*Constitutionality of the Conseil d'État.* The most important feature of the Conseil d'État is undoubtedly the power of the administrative section to quash and annul, *erga omnes,* unlawful administrative acts (art. 9, law of 1946, see *infra*).

Does this power conform to the constitutional scheme? This point has been in issue for a long time, and the opponents of this power[14] advanced some strong arguments. The structure of the Constitution is to be found in articles 25 to 30. The only powers enumerated are the legislative, executive, and judicial powers; Chapter 3 of Title 3 of the Constitution,[15] concerning the

[11] Arrêt "Flandria" du 5, 11, 1920, Rev. de l'Adm. 1921, p. 53, 142. Our Supreme Court adopted here some of the theses advanced by Wodon in his book, Le Contrôle juridictionnel de l'administration et la responsabilité des services publics en Belgique (1919).

[12] The aggrieved citizen can recover damages personally against the official where the official's act amounts to "faute lourde personnelle." In art. 24, the Constitution declares that no previous authority is needed to bring an action against public officials for the acts of their administration, except as provided for Ministers. As regards the official acts of Ministers, the House of Representatives has discretionary power to accuse them, and the Court of Cassation to try them, find the offense, and fix the penalty (Constitution, articles 63, 90 and 134).

[13] Lettre du 3 janvier 1934, Revue de l'Adm., p. 53.

[14] *E.g.* Professor A. Kluyskens, former Dean of the Law School at Ghent.

[15] The general outline of our Constitution is as follows:

Section 1—The territory and its subdivisions
" 2—Belgian Citizens and their rights
" 3—Governmental powers: a/ legislative Houses
b/ the King
c/ the judiciary
d/ institutions of the provinces and communes
" 4—Finances
" 5—The public force

judicial power, does not mention administrative tribunals; furthermore, since the decision of 1920, "it was quite useless to invent a new category of administrative rights."[16] This reasoning however is pure paralogism, based upon its own *demonstrandum* and presupposing as true what is in fact *probandum*.

The heart of the matter and the core of the discussion is whether or not the Constitution makes room for so-called "administrative rights." The answer is to be found in the Constitution itself.

Article 92 declares "Actions which involve questions of *civil* rights belong exclusively to the jurisdiction of the tribunals."

Article 93 declares "Actions which involve questions of *political* rights belong to the jurisdiction of the tribunals, *except as otherwise determined by law.*"

And article 94 provides "No tribunal nor contentious jurisdiction shall be established except *by virtue of a law.*"

In fact, no article of the Constitution sets forth explicitly the principle of separation of powers. This famous doctrine, in itself, is not a specific rule of law. This recommendation, although by one of the great masters of political science, may be followed in whole or in part. As Wigny has said[17] *"La Constitution n'établit pas le régime de la séparation des fonctions mais celui de la séparation des compétences. Chaque pouvoir exerce plusieurs fonctions."*

Be it as it may, the result of these discussions regarding the constitutionality of the Conseil d'État was not only to delay the creation of this body but, and this is an important point, to curtail the powers of this court. To abate the scruples of our Supreme Court, the legislator decided to grant to the Conseil, in principle, only a residuary jurisdiction (*une compétence résiduaire*),[18] that is to say that the Conseil can act only if the matter does not fall within the jurisdiction of the regular courts. On the other hand, this Court has a broad power to annul unlawful administrative acts, but has not the plenitude of jurisdiction (*la compétence de pleine juridiction*) of the French Conseil d'État. In suits for damages, the Belgian Conseil has authority only if the case in question cannot be decided by a regular law court. Moreover, in these cases, the competence of the Conseil is restricted to giving an advisory opinion (*un avis*) to the authorities of public administration to whom the final decision is reserved. Though the weight of this opinion is very great, the Conseil was not given authority to order the payment of damages by way of a judgment (*un arrêt*).[19]

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Section 6—General provisions
" 7—Constitutional Revision
" 8—Transitional and supplementary provisions

This Constitution does not apply to Belgian Congo. The Constitution of the Belgian Congo is the Colonial Charter, enacted in 1908 by the Belgian legislature which, alone, has the power to amend it.

[16] See note Leclercq to *Cassation* 11 mai 1933, Pas. 1933, I, 223. The same member of our Supreme Court advanced constitutional objections in note to *Cassation* 11 juillet 1935, Pas. 1935, I, 320, *adde* Pas. 1921, I, 139.

[17] Droit Administratif, Principes Généraux, 1953, p. 358.

[18] See article 7 of the law of 1946 regarding suits for damages: the Conseil d'État shall be competent only in the cases where no other tribunal is competent. Hence it follows that our Conseil is founded upon a double basis: *'justice déléguée'* as regards the power of annulment and *pouvoir résiduaire* as regards suits for damages.

[19] Vauthier, 3 ed. I, p. 704: "Le caractère incomplet de cette solution est le résultat

## II. Organization and Procedure

*Organization of the Conseil d'État.* The organization of the Conseil d'État has been conceived to guarantee to this jurisdiction as complete independence as possible. The Conseil, as we have seen, belongs entirely to the executive branch of the government, it is not a part of the judiciary; from an administrative and budgetary viewpoint it is not connected with the Ministry of Justice but with the Ministry of Interior. In the great body of administrative agencies the Conseil d'État has a distinct place: it is outside the administrative hierarchy; it is not presided, as in the case in other continental countries,[20] by the Head of the State or by a cabinet officer of the government. The first president and the president of the Belgian Conseil are members of the Council and are appointed in the same way as the councillors (*les conseillers*). Their independence may be compared to the status of the judges: tenure for life (article 34), retirement at the age of 72, except in the case of disability (article 51), *"émeritat"* (article 52), incompatibility with any other salary or with the profession of *"avocat"* (article 54),[21] disciplinary competence of the Cour de Cassation, sitting in *'assemblée générale'* (article 56),[22] assimilation to the members of the judiciary as regards crimes and *'délits.'*

The administrative section of the Conseil is composed of 13 members at least and 15 at most (a first president, a president, eleven councillors at least and thirteen at most, article 28), moreover there are nine auditors[23] (*auditeurs*), one auditor general, one clerk (*greffier*) and at least two assistant clerks (article 28, as modified by the Law of April 15, 1958). There is also a *"bureau de coordination,"* composed of three members (article 28); the main duty of this bureau is to co-ordinate the laws, Royal and executive decrees, in force in Belgium, in Belgian Congo, and in Ruanda-Urundi to keep these texts in order and up to date (article 36); this documentation is always at the disposal of the two sections of the Conseil. This bureau has utmost practical value, since it is a matter of common knowledge that the legal provisions present a bewildering disorder and that the search for the applicable law or decree turns out to be a painful task.[24]

In the legislative section there are assessors[25] (*assesseurs*), at most ten (article 29), usually law teachers. They are appointed for a period of five years, which period can be renewed, and are not subject to the rules of incompatibility applicable to the councillors and the auditors.

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de la méfiance manifestée par de nombreux parlementaires à l'égard de la nouvelle institution."

[20] In France the Minister of Justice, in the Netherlands the Queen, and in Luxemburg the Grand Duchess have the official presidence of the Conseil d'Etat.

[21] The law states an exception for university teachers.

[22] Some years ago disciplinary action was taken against a councillor who favored the communist doctrine. He was suspended from duty for six months.

[23] The auditors take part in the *"instruction des affaires"* (article 36). Their head is the auditor general. The auditors are assisted by *'substituts.'*

[24] *Cf.* Georges Ripert, Le Déclin du Droit, Paris 1949, especially the chapter on *'L'insécurité juridique.'*

[25] Note the confusing terminology: the councillors (*les conseillers*) are the judges—in the administrative section, while the assessors (*les assesseurs*) are the counselors of the government—in the legislative section of the Conseil. Usually, *e.g.*, in the Court of Assizes, the assessors are judges.

All these members of the Conseil—from the first president down to the assistant clerks—are doctors of laws (that is to say, holders of the ordinary law degree), and the law (article 35) makes a fair proportion as regards the knowledge of spoken languages (Dutch, French, and even German in 3 cantons).

To be appointed councillor or assessor one (he or she) must be 35 years of age, doctor of laws, and must have practiced law at the bar or have been a law teacher or an executive or judicial official for at least ten years. The law requires (article 30) that at least one councillor should have practiced law or been an executive or judicial official in Belgian Congo or Ruanda-Urundi for at least ten years.

The same requirements apply to auditors, but in their case the age is 28, and the number of years in required service is five. Clerks must be 27 years old and assistant clerks 25.

*Selection of Personnel.* The ordinary employees are appointed by the general assembly[26] of the Conseil. All persons mentioned heretofore (first president, president, councillors, auditors, members of the *bureau de coordination,* assessors, clerks, and assistant clerks) are appointed by the King. This appointment, so far as the first president, the president, and the councillors are concerned, is similar to that provided for by the Constitution in regard to the appointment of judges of the Supreme Court (*Conseillers à la Cour de Cassation*): the choice of His Majesty is limited to the candidates, named in two lists, each of them carrying three names. The first list is presented by the Conseil d'État itself, the other by the Parliament.[27] The assessors are appointed from a list of three names, presented to the King by the Conseil d'État. The members of the *bureau de coordination,* the auditors,[28] the *"substituts,"* and the clerks are also appointed by the King.

*Composition of the Sections.* The legislative section is composed of six councillors plus the assessors. These six councillors are designated by the King for a term of three years; the section is divided into divisions (*Chambres*) with 3 members each; the advisory opinion of the section (*l'avis*) is given in the two official languages (Dutch and French, article 23).

The administrative section is composed of three divisions (*Chambres*): a Dutch, a French, and a bilingual chamber. The provisions of the law of June 28, 1932 (on the use of languages in administrative matters) are applicable,[29] and the administrative section of the Conseil is bound, in each case, to state in its judgment that this law has been complied with.[30] The requirement of the law to furnish a translation of the advisory opinions of the legislative

[26] That is to say, the first president, the president, and the councillors, and sometimes (article 39) the assessors.

[27] Alternately by the House of Representatives and by the Senate; as regards judges of the Supreme Court, the Senate only is competent (article 99 of the Constitution).

[28] These auditors of the Conseil d'État undoubtedly have a judicial function: in fact they prepare the cases and their investigations are of substantial aid to the councillors.

[29] Articles 25, 26, and 27 of the Law of December 23, 1946, as modified by the Law of April 15, 1958.

[30] See C. E. 13 juillet 1949, Rec. jurisp. adm. p. 158.

section and of the opinions and judgments of the administrative section has produced a fine result: actually the translation service of the Conseil d'État assures a keen and exact usage of the legal terminology in both our official languages.

*Characteristics of the Procedure before the Conseil d'État.* The Conseil d'État is the highest Belgian administrative court; in principle, there is no appeal to the Court of Cassation, except in one single case, namely where there is a dispute with regard to the jurisdiction of the administrative courts or the regular Courts. In that case, and according to the Constitution,[31] the Court of Cassation shall decide this conflict of jurisdictions.[32] This is *expressis verbis* provided for by article 20 of the law of 1946.

When the Court of Cassation, sitting in joint session, quashes[33] the decision of the Conseil d'État, the case is returned to the Conseil, differently composed, and in this type of case the Conseil is bound to follow the law declared by the Supreme Court (article 20, § I).

It is to be noted that this form of appeal can be lodged only against a judgment (*arrêt*) of the Conseil, not against an advisory opinion (*avis*), e.g. in a suit for damages.

The territorial jurisdiction of the Conseil is nationwide (Belgium, Belgian Congo, and Ruanda-Urundi); the procedure[34] of the Conseil has been based upon the principles of simplicity, inexpensiveness, and effectiveness. The parties are not required to be assisted by counsel[35] (article 14), there is no *"ministère public"* (the auditors are charged with the preparation and instruction of the case under the supervision of the councillors), there is no *"avoué"* to represent the parties, and the serving of notice and the communication of the record (*dossier*) is done by the office of the clerk (*le greffe*) without the aid of a bailiff (*huissier*). The hearings of the court are public, unless publicity is declared by a judgment of the court to be dangerous to public order or morals.

The procedure before the Conseil is basically a written one. This procedure is adverse (*contradictoire*) in the sense that each party is entitled to see and to comment in writing upon all the documents produced by the other. The documents produced in the cause are available only to the parties and to the court, not to the public, since the defendant is always the administration, and the preparation of the case (*l'instruction*) is made by the auditor and not by

[31] Article 106.

[32] For this purpose, contrary to France, there is no *Tribunal des Conflits* in Belgium.

[33] Such conflict (*conflit de compétence*) between the Cour de Cassation and the Conseil d'État happened six times up to the present. It is now well settled that there is no special category of "administrative rights" (*cf.* Arrêt Trine, Cassation 21 décembre 1956, Pasicrisie 1957, I, 431, and note by Professor Mast in R.C.J.B. 1957, 168). However, it remains a true *crux* to find any non-formal distinction between a civil right and a political right.

[34] The details of this procedure are worked out in the executive decree of the Regent of August 23, 1948; from a comparative viewpoint it may be said that this procedure is quite different from the Anglo-American notion of trial, and from the 'day in court' where evidence is orally produced in proof of an issue.

[35] In France the *ministère d'avocat* is in principle required (although there are many exceptions, *e.g.* in a suit for annulment).

the parties. In this sense the procedure may be termed inquisitorial and even *"secret,"* as is the case in France and in the Netherlands.

All documents must be furnished in several copies. As said above, the office of the clerk assures their transmission under the supervision of the auditor general. After the exchange of the briefs (*les mémoires*), an auditor examines the file and makes a report of the case. By this report one of the divisions (*chambres*) of the section *"est saisie de l'affaire,"* i.e., the court has taken cognizance of the cause. If needed, the court can order a complementary instruction,[36] which is to be prepared by the auditor. If not, the court declares that the case is ready for judgment (*déclarer l'affaire en état*) and determines the date of the session. At the session a councillor, in open court, presents in an oral form a review of the facts of the case; the parties are entitled to give oral explanations, but usually they simply refer to their brief. In suits for damages[37] and suits for annulment the *Commissaire du Gouvernement* will be heard (articles 12 and 14). The judgment (in the suit for annulment) or the advisory opinion (in the suit for damages) of the administrative section of the Conseil must state the reasons (*doit être motivé*). Notice of the result is given to the parties by the clerk.

The judgments are enforceable as of right (*exécutoire de plein droit*) and the King assures their execution. The *formule exécutoire*[38] sharply differs from that applied to judgments of the judiciary; it expressly declares that the Ministers and other administrative authorities are bound to give their aid in executing the judgment of the Conseil. Since the advisory opinions have no mandatory force, they have no *formule exécutoire*.

The *délibéré* is secret. The *Commissaire du Gouvernement* has no vote; it does not appear whether the judgment is delivered unanimously or by majority. The judgment mentions the name of the parties and the oral statements made by the parties and by the *Commissaire*. As to the form, the judgment looks like a decree, usually a few articles preceded by a number of *'considérant que'* (whereas). The names of the judges and of the *'rapporteur'* are stated.

When the Conseil d'État quashes a contentious administrative decision (*une décision contentieuse administrative*) the cause is remitted to the jurisdiction *a quo*, except in the cases provided for by law (article 38).

The Conseil decides whether the judgment shall be published *in extenso* or *in parte*. The judgment has the authority of res judicata and operates *erga omnes* (if an administrative decision has been voided, nobody remains bound thereby).

What of the acts performed in virtue of the annulled decision? The French Conseil d'État regards them as void only if their relation to the annulled de-

[36] The Conseil has the power to order an examination of witnesses (*une enquête*) or a report by named persons (*une expertise*). If there is an examination of witnesses, the Commissaire du Gouvernement must be present. The law even declares (article 15) that the Conseil has the authority to order the Ministers and other administrative authorities to produce the documents in dispute.

[37] As we shall see, this is not a 'recours de pleine juridiction' as in France.

[38] Formula, at the end of a copy of a judgment, ordering an official to carry the decision into effect.

cision is very narrow; the Belgian Conseil d'État is inclined to take the same view.[39]

## III. Matters Within the Scope of the Two Sections

### A. The Legislative Section (articles 2 and 3, law of 1946)

As stated above, this section acts as a *'Conseil de Législation.'* This is a function which, logically, could have been exercised by a specialized organism. The legislative section never delivers a judgment (*arrêt*), only advisory opinions (*avis*). In some cases request for this opinion is optional, in others obligatory. The section never acts *proprio motu*. The opinion never has binding force, even in cases when the request is obligatory. The advisory opinion must always state the grounds on which it rests. The Conseil is precluded from giving an opinion on the political opportuneness of the proposed draft.[40] However, the Conseil has the power to underline that the draft is at variance with existing legislation or even with the Constitution. It is obvious that in this last case an opinion which points to inconstitutionality (*un avis d'inconstitutionnalité*) will engender a political crisis and is likely to be a momentous obstacle to governmental or parliamentary proposals.

When the advisory opinion of the Conseil is required (namely, on draft bills proposed by the government—except in emergency cases[41] and for draft bills regarding the budget—and on drafts of executive decrees with general application),[42] the drafts must be submitted to the Conseil before being presented for Royal signature. The opinion of the Conseil is annexed to and published with the statement of the reasons (*l'exposé des motifs*) or with the Report presented to the King by the Government. The administrative section of the Conseil will, upon request, annul executive decrees which did not conform to this requirement.[43]

As to the cases when the request is optional:

(1) the President of the House of Representatives or of the Senate may ask the Conseil for an opinion on the text of each draft bill proposed by the Government[44] or by Parliament[45] and on the text of the amendments thereto;

(2) the Ministers may ask the Conseil for an opinion on the text of each draft bill proposed by Parliament, on each draft of a *"décret,"*[46] and on the text of amendments to draft bills proposed by the Government or by Parliament;

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[39] This judicial policy operates to conserve legal stability.

[40] *"Le Conseil ne peut faire que la toilette législative des textes"* (statement in the parliamentary discussions).

[41] This emergency situation has been invoked in season and out of season.

[42] The French text says *"projet d'arrêté d'exécution organique et réglementaire"*; this applies to Royal as well as to Ministerial Decrees.

[43] C.E. 20 mai 1949, Arrêt Legrand, Pas. 1950, IV, 2 and Recueil 1949, 95, nr 48. There is, however, no penalty if the government failed to submit to the Conseil a draft bill which later became a regular law.

[44] This is called *"un projet de loi"* (*wetsontwerp*) (*'law project'*).

[45] This is called *"une proposition de loi"* (*wetsvoorstel*) (*'law proposal'*).

[46] This is an executive decree regarding Belgian Congo.

(3) the Prime Minister[47] may charge the legislative section with the drafting of proposed bills, executive decrees or ordinances or amendments, with regard to which he determines the subject matter and the purpose. This is the only case where the Conseil, instead of being a critic, becomes the maker of a draft.

The individual members of Parliament have no right to request the opinion of the Conseil d'État; this privilege is reserved for the Presidents of the legislative chambers.

When the opinion is requested in an emergency case, the presence of the assessors (besides the councillors, *cf. supra*) is not required. In exceptional cases, persons with a special knowledge of the subject matter may be heard (*appel en consultation*).

The declaration by the legislature that a revision of such constitutional provisions as it designates is in order (this being the first step to a revision of the Constitution) is not subject to the advisory opinion of the Conseil d'État.

B. The Administrative Section (articles 4 to 10 of the law of 1946)

(*1*) *Advisory Authority*. As regards this section of the Conseil d'État, an important distinction must be made between its advisory authority and its jurisdictional powers (article 4).

Under articles 5 and 6 the active administration is empowered to ask the Conseil for an advisory opinion (which, of course, must be '*motivé*') before taking a final decision.

Article 5 declares that the Conseil can only be consulted with regard to difficulties and disputed matters the solution of which is entirely within the scope of the executive branch of the government.[48] Thus, the legislature excluded all disputed claims that fall outside the competence of the executive. Under this article, the essential business of the Conseil is to make good administration possible and not to be a rival or superior administration.

Article 6 operates in the same vein. It excludes all litigious matters (*les affaires litigieuses*). The Ministers[49] may submit to the Conseil all problems and administrative matters that are not litigious. The law does not permit this high administrative court to become the legal adviser of the Ministers; each Department has, of course, its own legal advisers. It is not appropriate for the Conseil to deliver an advisory opinion on a disputed matter which afterwards may be brought before the Conseil itself or before a civil jurisdiction. It is to be noted that the law does not provide for publication of these advisory opinions. The reason is evident: these opinions, under articles 5 and 6, are the pure result of a consultation.[50]

Before we pass on to the very important article 7, par. I, let us note

[47] And he alone. Since the government—as a body—is responsible for the preparation of a governmental draft bill, the Prime Minister may use his power only with the consent of the Ministers united in council.

[48] This is a clear example of the residuary competence of the Conseil.

[49] This power does not exist in favor of the inferior administrations, nor in favor of the provinces, the communes or the individuals.

[50] *Ce sont des avis doctrinaux* (Vauthier).

that the Conseil is also the highest consultative body as regards the exploitation of mines (article 7, par. 2), and that the ratification of the by-laws of the professional unions is likewise within the competence of this section of the Conseil.

As explained above, the authority of the Belgian Conseil in suits for damages is restricted to giving an advisory opinion. The Court does not decide by way of judgment (article 7, par. 1). Once more, the Conseil exercises a residuary and subsidiary power, intervening in the case in which no other jurisdiction is competent. This means that the Belgian Supreme Court, which monopolizes this competence under article 92 of the Constitution (see *supra*, s. I), has the power to reduce and even to suppress this intervention by the Conseil d'État.[51]

The demand for an opinion on the issue of indemnification (*la demande d'avis sur l'indemnité*) may be submitted by anyone who complains that he has suffered an exceptional loss as the result of an action taken or ordered by the state, a province, a commune, or the colonial government, the performance of which action may be normal, defective, or postponed.

There must be a direct relation between the injury sustained and the action taken or ordered by the public authorities,[52] but the law does not state the requirement of fault.[53] On the other hand, the Conseil does not take into account moral detriment.[54]

In view of the principle of equality of all citizens with respect to public burdens[55] (*l'égalité des citoyens devant les charges publiques*) the damage must be exceptional. Up to the present time, notwithstanding a large mass of cases, the Conseil has rendered a favorable advisory opinion in only a very few instances; the yardstick to be used is "the abnormal, exceptional injury, by reason of its nature or importance going beyond the normal burdens and daily sacrifices of life in society and violating the principle of equality of all citizens with respect to public burdens" (C.E., 2 avril 1949, Rec. jur. adm., 1949, p. 38, idem p. 117, p. 123 and p. 183).

Under this article 7, the Conseil proceeds as a chancery court: it acts in equity, taking into consideration all the circumstances having regard to the public or private interest, and giving an opinion not on the right to recover, but only on the lawful interest of the person who made the request.

As far as the procedure is concerned, the Belgian lawmaker borrowed the French rule of the previous request (*le recours préalable*), to be sent to the public authority before asking the Conseil for an opinion. The demand to the Conseil can only be admitted by the Conseil after the public authority has rejected, *in toto* or *in parte,* the request for indemnification or has neglected

[51] In France the Conseil has the plenitude of jurisdiction and decides by way of judgment. In Belgium only the regular courts may order the State to pay money to individuals; Parliament thought that the Conseil d'État might be too free with the money of the State.

[52] C.E. 9 mai 1952, Recueil 1952, 278, note Prof. P. De Visscher.

[53] In opposition to article 1382 ff. of our Civil Code.

[54] C.E. 19 octobre 1951, Recueil 1952, 113. This restriction, although not very equitable, results from the parliamentary debates. *Cf.* article 11 of the law of 1946.

[55] This principle is embodied in our Constitution (articles 6 and 112). The most recent application is to be found in the legislation regarding compensation of war damage.

during 60 days to deal with the claim. In the first case, the demand for an advisory opinion must be submitted to the Conseil within 60 days after the request was rejected; in the second case within 3 years, the limitation running from the date of the request.[56]

The advisory opinion of the section is pronounced in open court and communicated to the parties. However, these formalities can be reduced to the publication of the purview of the opinion (*le dispositif*), if the Conseil should consider that this is necessary in the public interest.

The opinion is drafted as if it were a judgment, and the administrative authorities who will take the final decision are obliged by law to pass upon the meaning of this opinion. These measures clothe the opinion of the Conseil d'État with a moral authority which is likely to impress the administration.

(2) *Jurisdictional Powers of the Administrative Section of the Conseil.* Three classes of cases are to be distinguished: conflicts of jurisdiction between provincial and communal (i.e. local) administrations (article 8); plenitude of jurisdiction in some special cases (article 10); and the general power of annulment (article 9). These are discussed in the following section IV.

## IV. Jurisdictional Powers

A. Conflicts of jurisdiction between provincial and communal administrations.

The Conseil d'État solves, by way of judgment, the difficulties arising out of a conflict of jurisdictions between provincial, communal, and other inferior public bodies.[57] The demand can be brought before the Conseil by each administrative authority involved in the conflict. Individuals have no cause of action; if they suffered a loss as a result of this conflict, they are entitled to bring their action under article 9 (recourse for annulment) but not under article 8. The Conseil has no authority as regards conflicts of jurisdiction between the administrations of the state itself (the so-called *"administrations centrales"*); the government, i.e. the King, is the judge in these affairs.[58]

B. Plenitude of jurisdiction in some special cases.

These include:

(1) appeals from the judgment of the permanent deputation (being the body which functions as the daily administrator in provincial matters), having regard to the disputes concerning the validity of communal elections;

(2) with regard to certain administrative contracts made by the government before 1914;

[56] Art. 4 of the decree of the Regent, August 23, 1948.

[57] The law covers all public services separated from the state, the provinces or the communes, and constituting distinct jural entities (*les personnes publiques parastatales*).

[58] Of course, the government may ask the administrative section for an advisory opinion, under article 6 (see *supra*).

(3) with regard to the disputes between the Poor Men Commissions[59] and some problems arising out of the application of the law of March 10, 1925, concerning these Commissions.

In these special cases where the Conseil functions as a court of final appeal, the jurisdiction exercised by the King before the law of 1946 has been replaced by the jurisdiction of the Conseil d'État.

As we have seen above, the Conseil cannot order the payment of damages; on the other hand, as established by a settled course of judicial decisions (*une jurisprudence constante et fixée*) only the regular courts have authority to deal with disputes and claims arising in connection with administrative contracts.[60]

C. The general power of annulment (article 9).

As regards suits for damages[61] the authority of the Conseil d'État is extremely reduced in order to respect the constitutional prerogatives of the Cour de Cassation. As regards the power of annulment, however, the lawmaker has given to the Conseil the broadest powers in article 9 of the law of December 23, 1946; this is certainly the most important innovation in our administrative law. In Belgium as in France, this *'recours en annulation'* is the most precious sphere of the judicial business of the Conseil d'État and the most powerful control over the actions and decisions of the executive.

Although the *recours en annulation*[62] is at the heart of the judicial business of the Conseil—in such a case the Conseil is the first court to consider the matter judicially[63]—it must be remembered that the Conseil does not have the power to substitute its own judgment for that which is annulled. The Conseil is not a court of appeal: when an administrative act or decision has been annulled, it is up to the administration to take the decision whether or not the annulled act or decision is to be replaced and what shall be done in correcting the situation which resulted from the annulment.

As the law now stands, article 9 declares that the administrative section of the Conseil shall decide by way of judgment on the recourse for annulment, on account of the violation of substantial formalities, or formalities prescribed by law upon pain of nullity, or for reason of abuse or misuse of powers, the recourse being against the acts and the regulations of the various administrative authorities or against the contentious administrative decisions.

This recourse is in rem,[64] the administrative act or decision, if annulled, is null in respect to the whole world, the judgment of the Conseil operating *erga omnes*.

Let us now consider the conditions under which the Conseil can exercise this highest power:

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[59] Les Commissions d'Assistance Publique.

[60] C.E. 16 juin 1950, Recueil 1950, 229, arrêt Cavadias.

[61] This is called *"le contentieux de l'indemnité."*

[62] This recourse is available as a matter of right, and not as special privilege.

[63] The Conseil d'État is not the normal court of first instance in administrative matters; *idem* in France since January 1, 1954.

[64] *"Le recours est objectif."*

(1) There must be a recourse: the Conseil has no power to initiate the action. There is no *parquet* here similar to that of the tribunals and the courts, charged with the defense of the law and the protection of the public interest.

(2) The Conseil d'État is competent only in case no other jurisdiction is competent (the order of jurisdictions must not be disturbed: *pas de recours parallèle*). As we have seen above, this rule appears *expressis verbis* in the law as regards actions for indemnification, and the same reasoning must be applied here. The lawmaker did not intend to suppress the existing remedies, either before a civil tribunal or before certain administrative commissions. Of course, this exception does not exist when the two available actions have a different purpose; thus, it is possible to ask a civil tribunal not to apply an administrative ordinance[65] and on the other hand to 'appeal' to the Conseil d'État in order to annul the same ordinance. Moreover, it is settled that *'un recours gracieux'* (an extralegal appeal) is not to be considered as *'un recours parallèle.'*

(3) The recourse must be directed against an administrative act, regulation, or decision. Silence or inaction (usually for 60 days) after demand amounts to a rejection of the demand, i.e., a negative decision. An administrative advisory opinion is not subject to annulment. As we have seen, the same opinion prevails with regard to administrative contracts; indeed, these are not unilateral acts; moreover, there is a *'recours parallèle'* before the civil tribunals.

In Belgium as in France the doctrine of the *ministre-juge*[66] has been discarded. As regards *actes de gouvernement* (i.e. decisions of the executive which fall outside jurisdictional control by reason of their high political character), the actual trend is to limit this list.[67] However, some executive decisions remain completely outside the jurisdiction of the Conseil, e.g. the constitutional power of the King to convene the houses, to pronounce the closing of the sessions, to convene the houses in extraordinary session, and to adjourn the houses.

(4) The administrative act (*sensu latissimo*) must be an act of one of the national[68] administrative authorities (the state, the provinces, the communes, the colonial government, and the *personnes publiques parastatales*[69]). Nonadministrative authorities are excluded, even if they perform an act which is administrative in its nature (e.g. the approval of a concession by the legislative power).

(5) The act must be one which affects the personal interest of the plaintiff: *"le recours populaire n'est pas admis."*[70] The purpose of the action may not be the recognition of a civil right, although it is possible that an annulment affects these rights (e.g. the annulment of a promotion).

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[65] Under article 107 of the Constitution (see footnote 5).

[66] The doctrine that the department has the power to act as judge and especially in its own cause.

[67] C.E. 19 mai 1950, Recueil 1950, 202 arrêts nos. 358, 359, and 360.

[68] The administrative authority must be Belgian (C.E. 27 mai 1949, Rec. 1949, 103).

[69] *Cf.* footnote 57.

[70] C.E. 8 juin 1951, Recueil 1951, 281.

The grounds on which the act can be annulled (*"cas d'ouverture de recours"*) are:

(1) *Violation of substantial formalities or formalities prescribed by law upon pain of nullity*. This is a mixed question of fact and law and a proper subject matter for administrative case law. If the irregularity has had no influence on the decision in question, the Conseil will not annul the decision or act, by virtue of the principle of finality (the result has been obtained).[71] If the proceeding is only in the interest of the administration, the same result will be reached: this is an application of the doctrine that an exclusive administrative interest does not injure the individual.[72] The requirement of the legality of the administrative act (*pati legem quam fecisti*) furnishes another example of the case law of the Conseil d'État. As in France, the Belgian Conseil d'État imposes upon the administration conformity to the *"principes généraux de droit,"* the basic rules of our constitutional system, and will annul an act which does not conform.[73] This standard of conduct is not something enacted or formulated, but construed and declared by the Conseil. Likewise, the Conseil requires the administration to conform to the principles of natural justice and the rules of due administration (e.g. *la procédure contradictoire et les droits de la défense*). However, it is to be noted that the application of these doctrines is less frequent in Belgium than in France. It is settled that the obligatory consultation of the legislative section of the Conseil is a substantial formality, and the administrative section will annul an executive decree with general application (*les arrêtés organiques et réglementaires*) which did not conform to that requirement.

(2) *Abuse of power* (*excès de pouvoir*). In its simplest form, abuse of power exists where an administration acted without power, i.e. outside the sphere determined by law. A power cannot lawfully be exercised except in accordance with the express conditions upon which it was granted. In the case of delegated powers,[74] the administrative act is in principle not subject to the jurisdiction of the Conseil, since the administrative act is based upon a decree which has the same value as a law. There will be no annulment if the executive does not exceed the limits of the delegation, even if this delegation should be at variance with the Constitution or a prior law.[75]

(3) *Misuse of power* (*détournement de pouvoir*). Here the act of the authority on its face respects the law but violates its spirit; instead of using a power in the public interest, the authority used the power granted to secure a purpose outside the intended scope.[76] Abuse of power is concerned with the province of the *'légalité externe'* (the formal or external validity); misuse of

[71] C.E. 17 mai 1952, Recueil 1952, 288.
[72] C.E. 10 juillet 1951, Recueil 1952, 45.
[73] C.E. 28 octobre 1949, Recueil 1950, 20.
[74] *I.e.* powers delegated to the executive by Parliament.
[75] See Velge, Le Conseil d'État, p. 173 *et. seq.*
[76] Definition by M. l'Avocat général Hayoit de Termicourt, discours prononcé à l'audience solennelle de rentrée de la Cour de Cassation, le 15 sept. 1939.

power is concerned with the *'légalité interné,'* although it is not always easy to draw the precise line between the two.

A classic example of misuse of power is the case where a mayor (*un bourgmestre*) should order the demolition of a house, under the pretext that it is ruinous, while in fact he desires to move forward the building-line; or the case of a superior who orders the removal of an inferior, under the plea that the interest of the service so requires, instead of inflicting upon him a disciplinary penalty.

It will be noted that this notion of misuse of power enables the Conseil[77] to enlarge its jurisdictional control over the active administration. Even if the power is highly discretionary, the Conseil always has the authority to look into the factual reasons of its exercise. There is no room for a reign of administrative good pleasure (as it may be the case in England). This control is in the interest of the administration itself, as it enables the rectification of abusive practices. At the same time, and above all, it is a significant protection afforded to the ordinary citizen. The proof of misuse of power (and of abuse of power) may be furnished by all legal means. The Belgian Conseil d'État does not require, as the French Conseil seems to do, that the proof should appear in the record (*qu'il résulte des pièces du dossier*). On account of the importance of this kind of litigation the recourse for annulment on the ground of misuse of powers is brought before the general assembly of the *'section contentieuse du Conseil d'État.'* This change of venue operates *ex officio* when the section, to which the matter was referred, thinks that there is a likelihood of misuse of power.

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[77] The same remark applies to the American tribunals; see Schwartz, Le Droit Administratif américain (Paris, 1952) 176.

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## A SELECTIVE BIBLIOGRAPHY ON THE CONSEIL D'ÉTAT IN BELGIUM

The law of December 23, 1946, which introduced the Conseil d'État contains 65 articles. The text was published in the Moniteur Belge/Belgisch Staatsblad of January 9, 1947. The texts now governing the Conseil d'État (law of 1946, as modified by further legislation, and several executive decrees) may conveniently be consulted in the administrative part of the Codes Belges (editors Servais et Mechelynck) or in the Codes Larcier, *verbo* Conseil d'État.

The reports of the most important decisions of the administrative section of the Conseil are collected in the fourth section of the annual issue "Pasicrisie Belge" (Recueil général de la jurisprudence des Cours et Tribunaux et du Conseil d'État de Belgique). The Dutch and French texts together may be found in the 'Recueil des Arrêts et Avis du Conseil d'État/Verzameling der Arresten en Adviezen van de Raad van State,' edited by Baeyens and Dumont, two officials of the Conseil (publisher Uitg. De Gemeenteadministratie, Kortrijk).

The decisions are annotated in the specialized reviews on administrative law, e.g. Recueil de Jurisprudence du Droit Administratif et du Conseil d'État; Revue de l'Administration et du Droit Administratif de la Belgique; Tijdschrift voor Bestuurswetenschappen; Revue Communale; Tijdschrift voor Gemeenterecht.

Invaluable information is to be found in some leading articles of the 'Journal des Tribunaux' and the 'Rechtskundig Weekblad.' A most useful publication is the compilation by Sarot, J., Conseil d'État. Répertoire des Arrêts et Avis de la Section d'Administration, 1948–1953, Bruxelles, Bruylant, 1955.

The advisory opinions of the legislative section of the Conseil are sometimes published in the Moniteur Belge/Belgisch Staatsblad.

The literature on the Conseil d'État in Belgium is extensive. Much is to be found in the general treatises on administrative law, for instance in the books of professors Buttgenbach, Capart, Mast, Moureau, Vauthier and Wigny. Bibliography on particular matters is easily detected in these general works. The following purports to be a short list of essential books and articles on the subject-matter:

Annales Parlementaires, Parlementaire Handelingen, 1945–1946.

CAMBIER, C., L'annulation pour excès de pouvoir devant le Conseil d'État, Compétence et procédure. Bruxelles, 1951.

DEBEYRE, G., Le Conseil d'État Belge. Lille, 1953.

HAYOIT DE TERMICOURT, Le Conseil d'État et le Pouvoir Judiciaire. Bruxelles, 1939 (Mercuriale prononcée à la séance de rentrée de la Cour de Cassation, en 1939).

LESPES, J., Administrative justice and the Council of State in Belgium, Revue Internationale des sciences administratives. Bruxelles, 1952, 11 e.s.

MAST, A., De geschillen van Bestuur. Brussel, 1946.

MERTENS, J., De afdeling Wetgeving van de Raad van State, Tijdschrift voor Bestuurswetenschappen, mei 1951, p. 167.

MOUREAU ET SIMONARD, Le Conseil d'État en Belgique, Revue de Droit public et de la Science politique, 1948, p. 170.

PERRIN, F., Le contrôle de la constitutionnalité des avant-projets et propositions de loi par la section de Législation du Conseil d'État, Journal des Tribunaux, 3 juin 1951, p. 329.

VELGE, H., L'institution d'un Conseil d'État en Belgique, 1930.

VELGE, H., La loi du 23 décembre 1946 instituant en Belgique le Conseil d'État, 1947.

## ARBITRATION AND ARBITRATION PROCEDURE IN YUGOSLAVIA

1. Since the Second World War, Yugoslav legislation has not favored arbitral settlement of differences between Yugoslav citizens or Yugoslav enterprises. In internal relations, arbitral settlement of differences has been prohibited without exception. Therefore, no arbitration courts exist as institutions, nor is it possible to enter into agreements for settlement of differences by arbitration *ad hoc*. The reasons for such a conception are to be found in the fact that the Yugoslav economy has undergone such basic changes that settlement of differences by independent courts, and not by private arbitration, corresponds in principle to the character of economic enterprises managed by workers' collectives through their organs of self-management (workers' councils, management boards, and directors). Such judicial settlement of differences is in accordance with the functions assigned to economic enterprises in Yugoslavia.

The Law on Economic Courts prescribes that no arbitration courts can be established or agreed upon for disputes falling within the competence of the economic courts.[1] An exception is made only with respect to the Foreign Trade Arbitration in Belgrade, which is the only permanent arbitration court; its competence is confined exclusively to disputes of a commercial nature arising from foreign trade operations of domestic enterprises. The same idea pervades the provision of the Law on Economic Courts prescribing that

[1] Reform of Economic Courts in Yugoslavia, Volume 4, Number 4, Autumn 1955.

the economic courts shall determine economic disputes between domestic legal persons and foreign natural or legal persons unless it is agreed to submit such disputes to the arbitration court (Articles 3 and 7 of the Law on Economic Courts).

These provisions of the Law on Economic Courts suffered certain modifications by the enactment of the Law on Civil Procedure, which came into force on April 24, 1957. The main characteristic of the provisions of the Law on Civil Procedure relating to arbitral settlement of differences is that in the mutual relations between Yugoslav parties settlement of differences by arbitration courts remains inadmissible. However, as respects relations between domestic and foreign persons the attitude of the present legislation is more liberal, as the Law permits agreements conferring competence on arbitration courts if one of the parties at least is a foreign natural or legal person. In addition to this condition, it is required that the dispute be capable of settlement by arbitration between the parties and that it does not fall within the exclusive jurisdiction of the domestic courts.

In contrast with the earlier provisions of the Law on Economic Courts, it should be pointed out also that individual persons now are allowed to resort to arbitration if one of the parties at least is a foreign natural or legal person. Previously, arbitration agreements were allowed only between domestic legal persons and foreign natural or legal persons. Another difference extending the scope of arbitral settlement of differences with foreign persons consists in the fact that before the enactment of the Law on Civil Procedure, arbitral settlement of differences was permitted only for economic disputes. This restriction has now been removed, and the only criterion is whether the matter is capable of settlement by arbitration between the parties. As a result of these changes, both natural and legal persons may submit any disputes to arbitration, if one of the parties at least is a foreign natural or legal person. Finally, the Introductory Law to the Law on Civil Procedure has retained the jurisdiction of the Foreign Trade Arbitration in Belgrade, as a permanent arbitration court, for disputes arising from foreign trade and maritime relations to which reference is made below.

The attitude of Yugoslav legislation toward arbitral settlement of commercial disputes shows two characteristic features. First, arbitral settlement of disputes between domestic enterprises is not permissible. This is not admitted, not only on account of the structural differences of Yugoslav enterprises from private economic enterprises, on the one hand, and state economic enterprises—where such exist—on the other, but also because the specialized needs of the Yugoslav economy have been satisfied by establishing economic courts, which are regular courts, though in relation to the ordinary courts of general jurisdiction they appear as specialized courts for economic matters. The second characteristic is that, contrary to the attitude taken in internal relations, as between domestic and foreign persons legislation has always permitted arbitral settlement of commercial disputes; thus, a permanent system of arbitration for disputes between domestic enterprises and foreign natural or legal persons was established in 1946 by the Rules of Foreign Trade Arbitration.

In sum, Yugoslav law provides for the following possibilities of arbitral settlement of commercial disputes: before the Foreign Trade Arbitration

in Belgrade; before *ad hoc* arbitrations constituted in Yugoslavia; or before institutional or *ad hoc* arbitrations abroad. The essential conditions are that the subject matter in dispute be capable of settlement by arbitration between the parties and that one of the parties at least is a foreign natural or legal person. No other conditions are attached, except that the case shall not be one falling within the exclusive territorial jurisdiction of the Yugoslav domestic courts. Where these conditions are fulfilled the same regime is applicable to all cases regardless of the country of the foreign party, i.e., whether he belongs to a country with "planned or free economy," and/or whether he comes from a "socialist or non-socialist country." (It is not our intention here to seek a corresponding terminological solution, but only to stress the essential element of equal treatment of all foreign parties.) The question whether the parties have their permanent residence in different countries and whether their court jurisdiction is different is not relevant. This allows the conclusion that arbitration agreements in which both parties are foreign natural or legal persons, regardless of whether they are citizens of two different states or belong to the same state, are equally valid.

For the validity of an arbitration agreement, the law also requires that it should be in written form and permits such agreements with respect both to a specified dispute and to future disputes that may arise from a specific legal relation (Article 437 of the Law on Civil Procedure). Thus, no difference is made between arbitral agreements and arbitration clauses. In addition to the requirement that arbitration agreements be in written form, an uneven number of judges must be specified. It is not necessary to make a separate written agreement for arbitral settlement of a dispute, as such agreement may constitute an integral part of the principal contract, which is most frequently the case in practice.

The qualifications to be possessed by arbitrators are not prescribed; these, therefore, are left to be determined by the parties themselves. It is particularly not required that the arbitrators should be Yugoslav citizens.

Legal provisions concerning arbitration courts as a rule are not mandatory. Among these we should particularly stress the right of the parties to determine the procedure of the arbitration court. But if not otherwise agreed by the parties, the procedure is determined by the arbitrators. The parties are free to specify the content of the arbitration agreement with respect both to the constitution of the court and to the application of law and procedure. It is only natural that such free will of the parties should be subject to the restrictions of the rule of public order.

Awards of arbitration courts have the force of valid judgments; a record of such awards must be made, unless otherwise provided for by the parties; and the parties may stipulate the possibility of contesting the award before an arbitration court of higher instance. At the request of either party, the regular or economic court which would have been competent to decide such dispute in the first instance if no arbitration agreement had been made, shall put the clause of validity and execution on a copy of the award. The Foreign Trade Arbitration in Belgrade, as a permanent arbitration court, is authorized to put the clause of execution on its own awards.

2. The only institutional arbitration, the Foreign Trade Arbitration of

the Federal Chamber of Foreign Trade, decides disputes submitted to it by written agreement between the parties, made either at the time of conclusion of the transaction, or later, before or after differences ensue. Its competence extends to economic disputes arising from foreign trade relations between domestic economic enterprises, institutions, or organizations and foreign natural or legal persons, as well as maritime disputes between such persons. The Foreign Trade Arbitration decides disputes in councils or before a single arbitrator. The Federal Chamber of Foreign Trade draws up a list of arbitrators every year, who under the present Rules of Foreign Trade Arbitration must be Yugoslav citizens.

Besides settlement of differences, the parties are also entitled to institute proceedings of mediation for the purpose of conciliation before the Foreign Trade Arbitration. Such proceedings are initiated at the request of either party to the dispute seeking the services of the Foreign Trade Arbitration, even if there is no previous agreement as to the competence of the Foreign Trade Arbitration. The conciliation proceedings are conducted by a commission composed of the secretary of the Foreign Trade Arbitration and one commissioner chosen by each of the parties; the parties also may agree to have the proceedings conducted by the secretary of the Foreign Trade Arbitration alone.

Where the proceedings of conciliation are conducted before the commission, the commissioner of a foreign party may be a foreign citizen. If the parties agree to the proposed formula of conciliation this shall be put on record, and the adjustment shall be binding on the parties. If the proceedings of conciliation fail, all that was proposed, done, and established in writing or orally during the proceedings shall in no way affect the rights of the parties.

3. Awards of arbitration courts may be annulled by actions falling within the competence of the regular and/or economic court which would have been competent to decide such disputes in the first instance if there were no agreement for arbitration. An action for annulment of an award of an arbitration court may be filed with the competent court within 30 days. Besides this subjective limitation, a period of five years after the award has become valid is provided for by law as an objective term for actions to annul an award.

Awards of arbitration courts may be annulled on the following grounds: if no agreement on arbitration was made or such agreement was not valid; if any legal provision or clause of the arbitration agreement concerning the constitution of the arbitration court or the determination of the dispute was violated; if the award was not recorded and the parties had not agreed that the award ought not to be recorded; if the arbitration court has exceeded the limits of its task; if the terms of the award are incomprehensible or contradictory; if the arbitration court has pronounced a performance which is not permissible or is prohibited by law; if there is any ground for renewal of the proceedings. The grounds for renewal of proceedings include: participation in the proceedings by a judge required by law to disqualify himself; if either of the parties was by unlawful act denied the opportunity of pleading; if a party was not represented by his legal representative; if the award was founded on false depositions of witnesses or experts; if the award

was based on a forged document or a document in which a false statement was certified; if the award of the court was given in consequence of a criminal offence of the judge, a representative or mandatory of the party, the adverse party, or a third person; if a party became entitled to make use of a valid court judgment rendered earlier between the same parties and concerning the same claim; if the award was based on a judgment in criminal proceedings which was lawfully invalidated; if a party acquired knowledge of new facts or new evidence on the basis of which a more favorable award could have been made had these facts or evidence been available in the earlier proceeding, on condition that the party was unable, without fault of his own, to produce such evidence before the earlier proceeding was terminated by a valid court judgment.

4. Recognition and enforcement of foreign awards is governed by the provisions of the Introductory Law to the Law on Civil Procedure, which shall be in force until the enactment of the Law on the Procedure of Enforcement. Under these provisions, the awards of foreign arbitration courts are enforceable, except in the following cases: if no agreement on arbitration existed or such agreement was not valid; if some clause of the agreement on arbitration concerning the constitution of the arbitration court or its powers of determination was violated; if the arbitration court had exceeded the limits of its task; if the pronouncement of the court is incomprehensible or contradictory.

Awards of foreign courts, including arbitration courts, shall be enforced if they fulfill the following conditions:

(1) that under the rules of jurisdiction applied in Yugoslavia the foreign court was competent to decide such matters;

(2) that the party against whom the award was made was personally served with notice or order to open the proceedings, or had taken part in the proceedings in any way whatsoever;

(3) that the award has become final and enforceable under the laws of the country in which it was made, which must be certified by the competent foreign court or other competent organ;

(4) that there exists reciprocal treatment.

But even if the above conditions for enforcement of a foreign award are fulfilled, such award shall not be recognized if the party against whom enforcement is sought was not able to take part in the proceedings because of their irregularity, or if recognition of such award is contrary to the public policy of Yugoslavia.

5. The law respects the free will of the parties to a contract and applies this principle to arbitration agreements. If an agreement is based on free will of the parties, the same freedom should be logically extended to arbitration, since an agreement for arbitral settlement of differences is a part of the principal contract, irrespective of whether the arbitration clause is contained in the principal contract or in a separate document. As the above summary indicates, the Yugoslav law affords maximal possibilities for realization of the principle of free will of the parties as regards the type of the arbitration court, its composition and place of sitting, the citizenship of arbitrators, and the law and the procedure to be applied.

The Yugoslav law is obviously inspired with the realistic idea that, under the present conditions of general economic integration of national economic areas and the tendencies to enlarge international exchange of goods, it would be impossible to require foreign parties to recognize the Yugoslav courts and submit to their jurisdiction in every case. It would be equally difficult for a Yugoslav party to admit without exception the competence of foreign regular courts. This is not because of lack of confidence in such courts—the present experience in this respect is an adequate warrant of their efficiency, expert skill, and impartiality—but chiefly because the contracting parties are not sufficiently aware of the situation existing in particular countries. Vital differences in legislation, judicial practice, and organization of the judiciary are frequently found on both sides, as is unavoidable in mutual relations between the countries. This is probably one of the reasons why businessmen readily accept arbitration courts as deserving their confidence.

The special advantages of arbitration courts include the fact that they are less tied up to a specific system of legislation and come considerably nearer to generally approved standards. They offer greater certainty to both parties as regards the attitude of the court and a possible outcome of the dispute than do regular courts. We must also not overlook the advantages of arbitration as a mode of quick and expert settlement of disputes.

The theory expounded here is not only of doctrinal value; it is being carried out in practice by Yugoslav enterprises, since the Yugoslav economy is a market economy in which economic enterprises operate under the conditions of the market. Generally accepted standards of commercial law for the most part serve the needs of the market economy, which explains why the advantages and disadvantages of arbitration of differences between domestic and foreign businessmen are the same as those generally attached to arbitration. Even the distrust caused by ignorance of conditions or the lack of mutual experience in time may be removed or reduced to the minimum.

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## ON THE MARGIN OF THE ROME TREATIES

The increasing habit of having international agreements in a number of equally authentic languages multiplies the difficulties of their interpretation. The Treaties signed in Rome on March 24, 1957, constituting the European Economic and European Atomic Energy Communities, fall within this category, since they have been executed in the following authoritative texts:[1] French, German, Italian, and Dutch. The present comments do not, however, deal with possible discrepancies among those texts, but rather with the translation into English, prepared by the Interim Committee for the

[1] *Cf.* Arts. 248 EEC and 225 EAEC Treaties. At the face value of these clauses, all the texts are equally authentic. Yet in the factual development the French text was the original according to which the others were formulated. Though it is hardly possible to consider this "legislative history" admissible in the interpretation of the Treaties, it may at least help to understand some discrepancies.

Common Market and Euratom in Brussels in 1957, which represents the official English transcript of the Treaties. Though, generally speaking, this English version corresponds well with the French original, from which it was undoubtedly translated, there occur a few more or less serious defects worth pointing out, lest English-reading scholars be misled. Also, a word should be said about some other significant aspects of the Treaties.

But before proceeding further, it is well to observe two things: first, that the two new Treaties are identically worded in those parts where they deal with general matters, or with common institutions; second, that they follow rather closely the Treaty of the European Coal and Steel Community (ECSC), copying many of its clauses word by word. Consequently, the interpretation of the identical parts applies to all the three Communities, unless there are explicit provisions to the contrary.[2]

## I

Turning now to the English translation, it seems that the most meaningful deviation from the original is the translation of Arts. 164 (EEC) and 136 (EAEC) respectively. The English text is:

> The Court of Justice shall ensure observance of law and justice in the interpretation and application of this Treaty.

while in the official versions it reads:

> La Cour de Justice assure le respect du droit dans l'interprétation et l'application du présent Traité.[3]
>
> Der Gerichtshof sichert die Wahrung des Rechts bei der Auslegung und Anwendung dieses Vertrags.[4]
>
> La Corte di Giustizia assicura il rispetto del diritto nell 'interpretazione e nell 'applicazione del presente Trattato.[5]
>
> Het Hof van Justitie verzekert de eerbiediging van het recht bij de uitlegging en toepassing van dit Verdrag.[6]

It is quite obvious that there is no authority in any of the above mentioned texts warranting the inclusion of the term justice in the English version. But the issue here is not merely one of semantics. The root of the problem lies in the question whether the jurisdiction of the Single Court of Justice rests solely on the positive law of the Treaties, or whether it is of wider scope. Or, in traditional legal language, what is the source of the law of the Community?

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[2] *Cf.* for instance the differences between the ECSC on one hand and the EEC and Euratom on the other hand in Arts. 14, 15 ECSC; 189. 190 EEC; 161, 162 EAEC.

[3] *Cf.* (France). Assemblée Nationale, Troisième Législature, Session Ordinaire de 1956–1957, No. 4676.

(Belgium) Chambre des Représentants, Session 1956–57, 727 (1956–1957) No. 1.

(Luxembourg) Chambre des Députés, Session ordinaire de 1956–1957, No. 636, 637.

[4] (Germany) Deutscher Bundestag, 2. Wahlperiode 1953, Drucksache 3440.

[5] (Italy) Camera dei deputati, Legislatura II, Atti Parlamentari, N. 2814 (Urgenza).

[6] (The Netherlands) De Tweede Kamer der Staten-Generaal, Zitting 1956–1957, I 4725.

(Belgium) Kamer der Volksvertegenwoordigers, Zitting 1956–1957, 727, (1956–1957) No. 1.

That problem has already been debated in connection with the competence of the ECSC High Court, whose jurisdiction is delineated in the identical way in Art. 31 of the ECSC Treaty. It may, therefore, be useful to note that the majority of writers[7] have been of the opinion that the Court's jurisdiction is exclusively based on the positive law as outlined in the Treaty. Obviously, the term justice[8] would permit much wider application of the Court's competence.

Moreover, Arts, 173 (EEC), 146 (EAEC) (ECSC) in enumerating the grounds for annulment of the decisions of the Communities' institutions, clearly indicate that exceptions could be taken only if such decisions infringe upon the positive law of the Treaties. Thus, it seems that the inclusion of the term justice in the English text has definitely been an error. It could neither be upheld on the face of a literary translation of the authoritative versions, nor upon their interpretation.

Among the other questionable translations are the texts of Articles 167 (EEC) and 139 (EAEC) respectively. The English version states that the judges shall *appoint* from among the members the President of the Court. (Italics supplied).

As the text stands, it begs the question how this appointment is to be made, who has the final authority to appoint the President. But when the French, as well as German and Dutch texts, are examined, it is obvious that the procedure envisaged involves less an appointment than an election of the President by the Court's judges.[9]

Similarly, the English wording of Arts. 38 and 82 of the EAEC Treaty is misleading as to the character of the directive which the European Atomic Energy Commission may issue in order to stop infringements upon security arrangements. From all the four texts,[10] it is obvious that such a directive

[7] *Cf.* Paul Reuter, La Communauté Européenne du Charbon et de l'Acier. Paris: Librarie Générale de Droit et de Jurisprudence, 1952; "The rule of Law of the European Coal and Steel Community," Journal de Droit International, (1953) 5–23; J. de Richemont, Communauté Européenne du Charbon et de l'Acier. La Cour de Justice. Code annoté. Paris: Librarie du Journal des Notaires et des Avocats, 1954; Louis Delvaux, La Cour de Justice de la Communauté Européenne du Charbon et de l'Acier. Paris: Librarie Générale de Droit et de Jurisprudence, 1956; Franz Breitner, "Zwei Jahre Montangerichtsbarkeit," Europa Archiv (1955) 2:7243; S. F. Ophuels, "Gerichtsbarkeit und Rechtsprechung im Schumanplan," Neue Juristische Wochenschrift (1951) 4:693; "Juristische Grundgedanken des Schumanplans," *ibid.*, 289. F. Durante, "La Corte di Giustizia della Comunità Europea del carbone e dell'acciáio," Rivista di diritto internazionale (1953); D. G. Valentine, The Court of Justice of the European Coal and Steel Community. s'Gravenhage: Martinus Nijhoff, 1954.

[8] It has been suggested from circles close to the new Communities that the inclusion of justice in the English version has not been an error because the Court will have to have a recourse to many general principles of law not spelled out in the Treaties anyway. The author of the present comment does not share this opinion, since he believes that there is a difference between "the observance of justice,"—whatever it may mean—and the general principles of reasoning which jurists use. The former concept implies metaphysical considerations, the latter not.

[9] *Cf.* Les juges désignent parmi eux, . . . le président de la Cour de Justice.
Die Richter wählen aus ihrer Mitte den Presidenten des Gerichtshofs.
I giudici designano tra loro, . . . il presidente della Corte di Giustizia.
De rechters kiezen uit hun midden . . . de president van het Hof van Justitie.

[10] *Cf.* La Commission peut arrêter une directive par laquelle elle enjoint à l'État

has the commanding power of an injunction. Yet in English it is merely said that . . ."The Commission may issue a directive *requiring* the Member State concerned . . ." (italics supplied) which seems to give much larger latitude to a Member State than an injunction. Here again the question is not solely one of literary correctness. Needless to say, it is of fundamental significance for the legal character of the Community, whether its institutions can order an action to be undertaken by a Member State—even if lacking an effective power of enforcement—or whether they can solely require compliance.

Articles 178, 215 (EEC) and 28, 151, 188 (EAEC) represent another problem inherent in translations. First, proper selection of a term, second, its consistent use. The aforementioned articles deal with damages, and in this connection the authoritative texts use one term only: *reparation* (*Ersetzung, vergoeding, risarcimento,* and/or their grammatical derivations). In English, unfortunately, two expressions are used alternatively: reparation and compensation.[11] Thus, unless an original text is consulted, an erroneous impression is evoked that the differentiation originates in the Treaties themselves.

To conclude this part, it may be mentioned also that the heading of Title Two, Ch. VII, Safety Control, in the Euratom Treaty is not proper either. It should have been entitled Security Control, in accordance with the subject matter there dealt with.

## II

Though it is beyond the scope of these comments to analyze the Treaties in detail, at least a few words should be said about two interesting problems regarding their entry into force. The very first concerns the territorial extent of the new Communities in Europe.[12] Actually, both Treaties stipulate that they shall apply also to European territories for whose external relations a Member State is responsible.[13] In Euratom, the wording is slightly different,[14] but it does not seem that this variance is of great significance. It is much more interesting to determine which are the European territories, not forming a part of six Member States, but for whose foreign relations a Member State is responsible. No explanation of this clause appears in the

membre en cause de prendre . . . toutes les mesures nécessaires pour mettre fin à la violation constatée . . .

Die Kommission kann eine Richtlinie erlassen, mit der sie dem betreffenden Mitgliedstaat aufgibt. . . alle erforderlichen Massnahmen zu treffen, um dem festgestellten Verstoss ein Ende zu setzen . . .

La Commissione puo emanare una direttiva con cui essa intima allo Stato membro in questione di prendere, . . . tutte le misure necessarie per porre termine alla violazione constatata . . .

De Commissie kan een richtlijn vaststellen waarbij zij de betrokken Lid-Staat gelast . . . die noodzakelijk zijn om een einde te maken aan de vastgestelde schending; . . .

[11] It may be useful to remark here that the term "compensation" has not been considered as sufficiently clear in the United States. Stutsman v. Des Moines City Ry, (1917) 180 Ia. 524, 163 N.W. 580, 585.

[12] The overseas territories' extent of the Communities vastly differs.

[13] *Cf.* Art. 227, 4 EEC.

[14] Art. 198, 2 EAEC.

Treaties nor is an additional protocol included, as for the case of overseas possessions.[15]

In general, it is believed that the quoted passage may apply to the Protectorate of Andorra, the Principality of Monaco, and the Republic of San Marino. But the problem is not so simple.

An almost identical provision may be found in the ECSC Treaty, though there the condition is that the signatory states *assumed* the foreign relations of such a European territory.[16] Yet the clause has not attracted much attention, probably because special conditions were agreed upon for the Saar, while the other three above-mentioned areas have been practically without importance in the Community, which applies only to coal and steel industries. The present situation is, of course, entirely different. The Economic Community encompasses almost all economic activities, and the common tariff could certainly be made ineffective, if transshipments through the small Principalities could evade it. In addition some advantages of the Common Market are reserved for the nationals of the six Member States and firms incorporated according to their laws. Thus the question whether the Treaties apply—automatically—or not to the Principalities in question is certainly of importance. But the status of these territories, a favorite topic of international law dealing with protectorates and sovereignty, is far from being clear and cannot be dealt with here in detail. Instead a short summary of opinions is offered.

It seems that the case of the "Valleys of Andorra" is the least controversial, at least in the light of the judicial decisions of the French Courts. In spite of the opinion of P. Fauchille that Andorra's feudal origin prevents *"toute analyse juridique internationale,"*[17] the French Courts maintain that Andorra *"est située en droit comme en fait sous le protectorat de la France";* further, that Andorrans enjoy French diplomatic and consular protection; and that Andorra is neither a foreign state in relation to France nor a sovereign state which might conclude a diplomatic convention.[18] In view of the facts that decisions of French courts are directly executable in Andorra and that France, through her President, as a coprince of Andorra, may lawfully and with ultimate validity intervene in the affairs of the Principality,[19] it may be presumed that the European Treaties will be valid for the "Valleys" without need of an additional convention.

As far as Monaco is concerned, Fauchille and also other writers consider the Principality as a definitely sovereign state.[20] There is no doubt that Monaco concludes—at least some—international treaties through her own

[15] Implementing convention relating to the Association with the Community of the Overseas Countries and Territories, signed in Rome 25 March, 1957.

[16] Art. 79 ECSC. "Le présent Traité . . . s'applique également aux Territoires européens dont un État signataire assume les relations extérieures . . ."

[17] Paul Fauchille, Traité de Droit International Public. Paris: A. Rousseau, 1921.

[18] *Cf.* Tribunal de Perpignan, 6 December 1951 (Massip v. Crusel). Sirey, 1952, 2, 151.

[19] *Cf.* the case of Société "Le Nickel," when in 1933 the President of France voided the concession given to this society for the Valleys of Andorra. Similarly, a privilege to a group of Australians to operate a lottery from Andorra was revoked. *Cf.* Ch. Rousseau's remarks on Soc. "Le Nickel" in Sirey, 1935, 3, 1–2.

[20] *Cf.* for instance, L. Oppenheim, (H. Lauterpacht, edit.) International Law, 8. Edition, London: Longmans, Green and Co., 1955. Vol. 1, p. 193, n. 5.

department of state, as the recent agreements with the United States[21] amply show. On the other hand, Monaco is obliged on the basis of the Treaty with France of July, 1918, to exercise its sovereignty in perfect conformity with the political, military, naval, and economic interests of France.[22] Yet, because of the clear freedom of Monaco to conclude international conventions, it could not be maintained that France automatically takes over responsibility for the foreign relations of the Principality. Consequently, it seems that the European Treaties do not extend *ipso facto,* merely on the ground of the mentioned articles, to this territory.

Similarly, it does not appear that the Treaties could apply automatically to San Marino. Though some authors consider the Republic as a semi-sovereign protectorate of Italy,[23] Sotille has strongly defended the thesis of the full sovereignty of this small republic.[24] Whether it is really a full-fledged sovereign state may possibly be doubted, but there is no question that San Marino has concluded international treaties in its own name.[25] Moreover, the convention between Italy and San Marino of 1939 (amended)[26] further indicates that, equally as in the case of Monaco, to apply the European Treaties to San Marino would require an additional treaty. On the other hand, it may well be possible that an agreement with Italy may suffice instead of an amendment to the Rome Treaties. The same may be applicable, *mutatis mutandis,* to Monaco and France as well.

The other intriguing problem mentioned, arising from the entry into force of the Treaties, concerns the liability of the Committees for damages caused by their institutions and employees.[27] A similar provision in the ECSC Treaty[28] does not cause difficulties, since in the Coal and Steel organization only the Community itself has legal personality and as such is liable for damages. But in the EEC and Euratom not only the Communities themselves but also some of their institutions have legal personality. Thus the question arises whether the Single Court of Justice or the national tribunals will be competent to entertain suits in which they are parties, viz. as concerns the European Investment Bank, the Euratom Agency, and the Euratom Joint Enterprises. The great inherent dangers of nuclear energy make the issue of liability of primary importance. As the Treaty stands right now, it is not

[21] Agreement between the United States and Monaco on Passport-Visas. March 31, 1952. TIAS 2528, and Agreement on Copyrights. TIAS 2702.

[22] Art. 1 of the Treaty of July, 1918, quoted in Fauchille, *op. cit.* Sect. 178.

[23] *Cf.* previous editions of Oppenheim, *loc. cit.*

[24] Ant. Sotille, L'organisation politique et juridique de la République de St. Marino et sa situation internationale. Genève: H. Chavanes, 1923, p. 31, and an opinion contrary to this of Sotille in Fauchille, *id.,* Sect. 181.

[25] *Cf.* for instance, the treaty concluded with the United Kingdom on the abolition of visas. U.K. Treaty Series, No. 70 (1949), London: HMSO Cmd. 7825.

[26] *Cf.* Trattati e Convenzioni. Accordo Aggiuntivo alla Convenzione di amicizia e di buon vicinato fra la Repúbblica Italiana et la Repúbblica di San Marino. Roma 24 Marzo, 1948. Roma: Tipografia Riservata del Ministero degli Affari Esteri, 1948. This Accord amends the Treaty of March 31, 1939, and its modifications of 1942 and 1946.

[27] Arts. 215 EEC and 188 EAEC.

[28] Art. 40, ECSC.

quite clear who would have authority over disputes on this account, and to what extent, or who would be liable for damages.

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## NEW LEGISLATION

GREECE: NEW CODE OF PRIVATE MARITIME LAW—On February 28, 1958, a new Greek Code of Private Maritime Law was adopted to meet the needs of the expanding merchant marine as a part of a general program to bring the present Greek legislation up to date. In addition to simplifying individual titles devoted to maritime law in the existing Commercial Code, the new Code is designed to co-ordinate Greek maritime law with international trends in legislation, consistent with local practice. Various terms have been more precisely stated, and more appropriate provisions made with regard to special matters dealt with in the Civil Code; in particular, the provisions relating to ship registration regulations, nationality requirements, mortgage registers, etc., have been omitted from the new Code and will be included in a separate Code of Public Maritime Law which is now in preparation. Among the objectives of the new legislation are return to the Greek flag of Greek-owned vessels,[1] increased foreign financing of Greek maritime concerns, which is further facilitated by more recent legislation adopting preferred mortgages on ships. The new Code includes 297 articles grouped under 15 titles. Its sources include, in addition to Greek legislation, various international conventions and the more important European codes (German, Italian of 1942, Dutch, French, and Belgian).

The more important provisions of the Code are as follows:

Title 1 redefines vessels for the purposes of the Code as self-propelled vessels of ten tons capacity or more, with the proviso that titles 3, 4, 6, 7, 12, 13, 14, and 15 apply to all other types of vessels. It also abolishes the requirement of notarial authentication of transfers of vessels. Title 2 deals separately with joint interests in vessels, which are of special importance in Greek shipping. More adequate protection is given to minority rights through more systematic definition of the authority of the ship's husband, without, however, impairing the exploitation of the vessel or the rights of the majority—e.g., the ship's husband's authority cannot be opposed to third parties. Title 3 reproduces without essential change the existing law concerning the rights and obligations of the master.

Maritime labor and the rights and obligations of seamen are regulated by Title 4. The new provisions of this title, which apply on a reciprocal basis to alien as well as native members of the crew, have taken account of most of the continental laws, but reflect mainly the special requirements at the

[1] According to an unofficial figure, in 1957, only 373 of 1575 Greek-owned ships flew the Greek flag.

present time of the Greek merchant marine. Title 5, relating to the liability of shipowners, substantially improves the former law by allowing the shipowner to limit his liability either by surrendering the vessel with the gross freight or by offering a sum of money equal to 3/10 (plus 3/10 in case of personal injury) of the value of the ship before the voyage, appraised in a speedy and efficient procedure. The pilot is included among the individuals for whose activities the owner is liable. In case of a demise charter, the owner and the charterer are to declare the charter in the ship's certificate of nationality and in the ship's registry at her home port; otherwise, it is presumed that the vessel is being operated on the owner's account.

In Title 6, dealing with charters and maritime transportation, the new Code selectively incorporates the Hague Rules of 1922 and the Brussels Convention of 1924, which are introduced for the first time in Greece, and systematically covers the whole field of chartering, without, however, giving premature legislative sanction to advanced theories and tendencies. The subject matter is distinguished as chartering of part or all of the ship, carriage of specific goods, and transportation of passengers, there being no prohibition of possible combinations (*e.g.,* bare boat charter). The liability of the owner is more strict than under the Hague Rules, specific rather than due diligence being required. Bills of lading are to be issued in single copies—instead of the four under the previous law—and only by the captain after lading. The new provisions recognize neither bearer bills of lading (as in the previous law) nor bills of lading issued on delivery. Also, there are no provisions on through bills of lading or delivery orders, since it was thought that these would be premature.

More systematic provisions on ship's mortgages (*fiducia*) and abolition of bottomry, which has not been used for some time, effect a closer approach of the Greek to the Anglo-Saxon legislation and thus will facilitate financing of the Greek merchant marine. (Title 7)

The following titles, 8, 9, and 10, adjust the Greek legislation to most international conventions. However, the Brussels Treaty of 1926 concerning maritime liens has not been followed, in order to avoid increasing the difficulties of marine financing. The hypothecation clauses have been conformed to the appropriate provisions of the Civil Code and no longer include freight, as in the previous law. In contrast to the former law, vessels which have been libelled may be released under bond in an amount determined by the court. In these provisions, due consideration has been given the Naples Convention of 1951 (Brussels, 1952) regarding the seizure of ships.

Title 11 deals extensively with general average, particular average being left aside. For the most part, the York-Antwerp Rules are followed in this title, which determines, for the first time in Greek law, whether or not expenses on account of permanent repairs are to be included in the general average, depending upon whether such repairs are necessary or increase the value of the vessel.

In Title 12 on collision, the provisions of the Convention of Brussels of 1910 have been included (this Convention, although ratified by Greece in 1911, had not been previously enacted as the law of the land). Among other provisions, the principle of equal liability where apportionment of liability

is not possible is included, while the jurisdiction of the Greek courts is declared on the basis of (1) habitual residence of the shipowner in Greece, (2) Greek nationality of the vessel, (3) occurrence of collision in Greek territorial waters, or (4) attachment of the vessel in Greece. As explained in the Committee Report, these bases of jurisdiction are supported chiefly on the ground of availability of evidence. Similarly, in Title 13, the Brussels Salvage Convention of 1910, which, although ratified in 1911, had not been incorporated in the Greek laws, is now included. In accordance with the Convention, the new provisions abolish the distinction between salvage of a ship in danger and salvage of a shipwreck.

Title 14 covers marine insurance, supplementing the general provisions on insurance of the Commercial Code, and is based mainly on the 1948 Draft of an Insurance Code, not yet enacted. Instead of enumerating the insurable interests, as did the old Code, the new law contains a general provision covering every interest subject to the perils of the sea.

The last title, 15, deals with prescription, simplifying the periods of limitation, which are subjected to the rules of construction in the Civil Code.

The new maritime Code adopts many concepts and provisions of international conventions and foreign laws that are practical from the viewpoint of Greek needs. Without loss of national character, it is doubtless a step toward the realization of the principle that "the law of the sea must be one."

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# Book Reviews

*Taxation in the United Kingdom*. World Tax Series prepared by the Harvard Law School International Program in Taxation in consultation with the United Nations Secretariat. Boston/Toronto: Little, Brown & Co., 1957. Pp. xxxiii, 534.

Anyone whose background in income tax has been acquired by contact with the taxing statutes of either Canada or the United States and who has been exposed at long range to the United Kingdom income tax system with its innumerable complexities cannot fail to be impressed with the clear, concise and objective presentation which is offered by this book. Primarily this volume, which is the first of a series on the tax structures of various countries, is devoted to a descriptive analysis of United Kingdom income taxation, and eleven of the fifteen chapters deal with income taxes. One chapter describes the purchase tax, one discusses the other excises and the customs duty and finally a chapter contains a description of what are designated "taxes on capital," notably real property taxes and death duties. The whole is prefaced by a chapter which provides an excellent background by covering such subjects as the economy of the United Kingdom, the relationship of the tax burden to the gross national product, the revenue from the various taxes and perhaps most important of all to the reader who is not familiar with the British legislative process, a summary of the mechanics of tax legislation.

It is apparent that a great deal of thought has gone into the order in which the material is presented. In attempting to find answers to United Kingdom income tax questions, it is imperative that there be a clear understanding of the basic peculiarities of the income tax pattern, particularly insofar as it differs from that of Canada or the United States. For example, if the observer does not understand the taxation at source principle, many aspects of the United Kingdom income tax structure will appear illogical. The author has recognized this problem and wisely refrained from plunging headlong into a detailed summary of the Income Tax Act. Rather, he has sketched in the development of the taxation at the source principle which he quite properly refers to as "the most distinctive feature of the United Kingdom income tax system."

After laying the foundation, the book then proceeds to explain the arrangement under which income is divided into schedules and sub-divided into cases. Fortunately, the special problems and rules relating to schedular income are described only briefly at this point, and the detailed treatment comes later under headings more familiar to the North American reader. Then such fundamental subjects as rules of residence, deductions, and accounting aspects of income tax are discussed.

At this point, the reader should be well prepared for a more complete description of the determination of tax on various forms of income. One chapter is then devoted to each of the following classes of income: business income; income from personal service; investment income, and income from natural resources, farming, and insurance. The Income Tax Act sets out only general rules for calculating the taxable amount and much is left to regula-

tions and case law, and the author has filled in this gap more than adequately.

The businessman or the tax practitioner outside the United Kingdom in order to assess the total burden of United Kingdom taxes on income which will be taken out of the United Kingdom, naturally is concerned with special rules applicable to nonresidents. This vital question, which is frequently inadequately dealt with, receives special attention. A lengthy chapter describes the international aspects of the income tax structure as it affects both residents and nonresidents of the United Kingdom. Of particular interest to the foreign corporate investor is a section in which the various arrangements under which a foreign corporation could carry on business in the United Kingdom are compared from the tax burden viewpoint.

The remaining chapter is devoted to one of the most complicated sectors of the United Kingdom tax structure, namely, the profits tax. One of the main obstacles to obtaining a concise picture of the profits tax is the fact that the statutory provisions have never been consolidated and are to be found scattered through the tax statutes of more than twenty years. The author is to be congratulated in compiling an accurate summary of this legislation. Although 1958 legislation has outdated some of the material on the profits tax, the chapter is nevertheless invaluable.

In addition to providing a highly logical and orderly treatment of the tax structure, the volume is made even more helpful by prefacing each chapter with a topical outline which should greatly assist the reader who is using the book as a reference source. It is to be hoped that the format will be carried over to subsequent volumes of the series.

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*Taxation in Mexico*. World Tax Series prepared by the Harvard Law School International Program in Taxation in consultation with the United Nations Secretariat. Boston/Toronto: Little, Brown & Co., 1957. Pp. xxviii, 428.

With the expansion of United States' interests in the international field since the Second World War, and with the growing importance of taxation throughout the world, comprehensive studies in English of the tax systems of the major industrial and trading nations have become legal, economic, and political necessities. It follows that the books of this series are essential tools for lawyers, particularly those specializing in private international law.

*Taxation in Mexico* is the third of the series to be issued. *Taxation in the United Kingdom* and *Taxation in Brazil* preceded it, and *Taxation in Australia* has just been published. The series is meeting the need for a description of each tax system in its own legal and administrative terms, and it presents each system so that it can be compared, point by point, with others.

Each volume of the series covers a different country but follows the same structural form in order to make comparison easier. Therefore, a review of *Taxation in Mexico* is applicable, as far as form is concerned, to the volumes covering the tax systems of other countries.

The most striking advantage of *Taxation in Mexico* is the rather obvious one that it gives the American lawyer a thoroughly reliable source of infor-

mation about Mexican taxation in the English language. The words "reliable source of information" are not used academically. Within a few days after its advent, your reviewer had occasion to take *Taxation in Mexico* to Mexico to aid in the solution of several rather complex corporate and individual tax problems. The book survived the critical inspection of Mexican tax experts, and in fact proved to be the best single source of tax information available.

An outstanding feature of *Taxation in Mexico* is its index system. A good index is taken for granted by the American practitioner who has not had much experience with other jurisdictions. However, the value of such an index is fully appreciated by those who have had to find the law in most foreign jurisdictions where the system of indexing is usually rudimentary. Taking into consideration the fundamental difference in approach between the Common Law and Civil Law, this index can be compared favorably with those of Commerce Clearing House or Prentice-Hall.

For those who know Spanish, an important device offered by *Taxation in Mexico* is the section on "References." This part of the book consists of a "Table of Statutes" which correlates its various sections with the corresponding articles of Mexican tax laws and regulations. Thus, even for the Spanish-speaking lawyer, *Taxation in Mexico* provides a condensed and ready reference to the sources of Mexican tax law. Throughout the volume, numerous footnotes also refer the lawyer to the corresponding Mexican statute or interpretative decision and often include helpful comments.

The inclusion of corporate and individual income tax return forms, with translations, together with the examples illustrating the application of the various Mexican taxes aid the practitioner in acquiring a concrete picture. He is thus able to make an intelligent estimate of the amount of tax which may be assessed.

The large task now remaining for the editors is to keep the material treated in *Taxation in Mexico* up to date. This work is as essential as the writing of the original volume, and it is gratifying to note an awareness of its importance in the preface where the promise is made of "periodic supplements by means of which it is planned to keep the information in the basic volumes up-to-date." This promise has been kept by making available the 1958 Cumulative Supplement to *Taxation in the United Kingdom,* and formally announcing that the 1958 Cumulative Supplements to *Taxation in Mexico* and *Taxation in Brazil* are coming soon.

Hard experience has taught your reviewer to approach any English language work on Civil Law with skepticism. In this case a disbeliever of long standing has been converted to the idea that Mexican legal tax concepts can be accurately described and discussed in English.

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VON MEHREN, A. T. *The Civil Law System, Cases and Materials.* Englewood Cliffs, N. Y.: Prentice-Hall, 1957. Pp. xxii, 922.

In a review of Rudolph B. Schlesinger's book,[1] I pointed out:

"As a whole the book shows the possibility of dealing through the case

[1] Schlesinger, Comparative Law, Cases and Materials, Brooklyn, 1950, in Rivista del Diritto Commerciale, 1951, I, p. 252.

method (*lato sensu*) also with problems of comparative law. If some reservations can be made, they mainly derive from the difficulties of the first attempts; in fact, one must recognize that the application of the case method to comparative law still is at the very beginning."

Others have doubted the possibility. In order to disprove their doubts (if not to win them over) I have myself utilized case materials with my comparative law book on contracts.[2] This book has given rise to doubts and reservations; all the more so because it was directed to civil-law readers—to a milieu where the case method, even in a mixed version, is still rarely applied. Now, after several years of teaching experience, I am prepared to say that, in teaching comparative law, the case method (*lato sensu*) is the method par excellence.[3]

In the present work by Professor von Mehren, the task of teaching comparative law through the case method is again undertaken and brilliantly fulfilled, despite some reservations which are mentioned below. This book strengthens my belief that it is not only possible but necessary to use the case method (*lato sensu*) in teaching comparative law.

Naturally, a review of this work must have different tones and content for American or at least common-law readers as contrasted to civil-law readers. In the United States, the case method represents, so to say, the atmosphere which law students breathe, while law teachers, familiar with this method, show long experience and particular art in applying it. I make this observation, since a civil-law reader might desire that the connecting texture, that is the criterion according to which cases and materials are organized, should be more plainly apparent than it is in this work.[3] But if I am not mistaken, the American case method specifically proposes, *inter alia,* to induce the student to search for that sometimes elusive connecting link. After all, case books and corollary materials are not textbooks but serve rather as a general point of departure for classroom discussion. Having said this, however, I would like to note that at times in the present book the quest for a central theme and the connecting links requires a certain effort on the part of the reader and in fact leaves a margin of doubt. For example, in the part dealing with contracts, concepts or names of "cause" or "form" return again and again in different connections, and it is difficult sometimes to perceive their meaning or their relation to the situations or problems in question. (See pps. 463–464; 493–497; 515, 553–554; 580–581, 585; 610–612; 641–662. And see also *infra*).

From another point of view, the connecting texture, or criterion for organizing cases and materials, may on examination give rise to some reservations or doubts. But these disappear when one realizes that the work was not intended to be either a complete exposition of the civil-law system (employ-

[2] Il contratto, Problemi fondamentali trattati con il metodo comparativo e casistico. 2 vols. Milano, 1955.

[3] *Cf.* in this sense the foreword of my "Il Contratto," I, p. vii *et seq.* Of course when directed to civil-law students, the case method must be conveniently adapted. In this connection and with reference to the benefits that our students could derive from the use of such an adapted method, see also my article "Le Scuole di diritto negli Stati Uniti d'America," Rivista del diritto commerciale, 1950, I, 333–334. And 3 Journal of Legal Education 513 (1951).

ing the French and German systems as examples thereof) nor a monographic dissertation on one single subject. In fact, the author himself makes this point in the preface (which also includes an introduction and some general historical observations, and a discussion of the codes and judicial organization in civil-law jurisdictions) stating that the work contains materials designed for more than one (year-long) course in comparative law or for different courses.

Hence there has been, on the part of the author, a certain choice of subjects which he deems adapted to convey to an American student the idea of the civil-law system, subjects to be worked with only after the usually necessary general introductory discussions (among the latter I would also have included some mention of the judicial process, which is found instead at the end of the book, pp. 821 *et seq.; cf.* also on this point the review by Prof. de Nova in Jus, 1957, p. 556).

These subjects have been chosen very wisely in the by now classic substantive area for comparative study, viz., public law and particularly French administrative law, and in the private law field, torts and contracts. The choice as monographic themes of public law and of private law as well would seem to limit severely, if not to exclude, the possibility of covering the entire subject matter in the same year-long course. Thus, one wonders whether it would not be more efficacious either to give the book a predominantly private law character, limiting it to a few public law topics, or to develop even more fully the public law sections (also represented by German law) as appropriate to a select seminar course.

My own impressions and personal experiences (which may not be entirely free from misconception) suggest that a year's course in comparative law which is not to be simply a cataloguing of analogies (an end which the author does not want his book to serve) ought to be an intensive course with a thorough examination of the legal institutions under consideration; what the French call a *"cours approfondi."* Professor von Mehren's book makes this possible. How happy, as it seems to me, was the choice, in the torts area, of the theme of absolute liability in two of its most interesting and timely manifestations, industrial and automobile accidents, which allow American students to take stock of certain methods and techniques of judge-made law and especially of the famous article 1384 of the French Civil Code. Fault and absolute liability today are basic problems which must be dealt with, and will remain so tomorrow in the world of the future.

The contract theme, excluding the introduction and the general considerations mentioned above, occupies about half of the book. This it deserves, as it is the most suitable, today at least, for a comparative law course.

On this subject (contracts), the author seems to agree with the common, particularly French theory of the validity of pure consent as the source of contractual obligations;[4] whereas I have tried to point out the necessity of an objective element (the so-called "sufficient cause") or if this is lacking, the necessity of form.[5] My dissent from the common view is founded not on

[4] *Cf.* for an analogy my review of Schlesinger's book, *supra* note 1.

[5] *Cf.* von Mehren, *op. cit.*, p. 463–464, 493–497, 515 *et seq.; cf.* also von Mehren, La. L. Rev. 687 (1955) referred to at p. 465.

abstract reasons or theories, but rather on an interpretation of the case law and the specific rules of our codes concerning different types of contracts. The cases reported on pp. 641–681 seem to suggest a similar interpretation inasmuch as the problem of enforceability of promises is discussed not on the basis of mere consent, but rather on that of sufficient cause as an alternative to form.

The case method (which connotes diffidence towards the generalizations and theoretical superstructures so common to the civilians) shows its utility in comparative law, as a tool employed to discover the effective legal rules or the law in action of a given system behind the doctrinaire façade of theoretical generalizations. Of course, much depends on the heaviness of that façade. It is for this reason that one cannot take serious issue with the author, because the fault is ours; we civilians must take the blame in having made the theory of the so-called "cause" a real puzzle.

However, at present it would seem very interesting that the reinterpretation or appraisal of our law in action concerning "cause," form, and consent should be undertaken by a common-law jurist, who should be, I believe, more prepared and trained than any of us to treat the problem by the case method. A further reservation I should like to note in regard to this part of the book, is that some areas, such as legal transactions (*Rechtsgeschäft:* pp. 470 *et seq.*), abstract promise (p. 513 *seq.*), and Roman law (p. 567 *seq.*), should either have been more extensively developed or left aside. In particular, it seems to me that the mere reproduction of Roman texts (equivocal, confused, and the object of contemporary romanistic technical criticism) enmeshes the student in a veritable bramblebush of grave difficulties and inherent risks.

These reservations and criticisms (in the last analysis simply a matter of opinion) do not touch on the substance of the book, which is on the whole a work of great interest, of great utility in the development of comparative teaching, and a really fine job. It is truly a hard task that has been completed in collecting, ordering, and illuminating materials so vast and complex, and in areas so difficult. One who wishes to teach a comparative law course will find in this book a vast arsenal of cases and materials for discussion, as well as questions and illustrative notes and various other didactic tools, all first-rate.

As for the materials, the author is to be applauded for his intelligent and accurate choice of passages from some of the more authoritative civilians who can be found cited alongside of equally authoritative common lawyers: this is a contrast, or comparison of the greatest interest. As for the questionnaires, while some seem rather difficult for the student,[6] they are, nonetheless, of great didactic value. At the same time, through the Socratic technique and through comparison, they serve to expose and to test characteristic traits and inherent problems of various institutions. There are a large number of illustrative notes; these are of special value, since the case method in the comparative law area presents special difficulties which advise a mixed approach.

[6] *Cf.* my book "Il Contratto" and Professor Rheinstein's review of the same in 4 American Journal of Comparative Law (1955) 452 *et seq.;* see also my course "The Fundamental Problems of Contract" (mimeographed) University of Michigan Law School, 1958–59.

Many of these notes offer data (also statistical data) illustrating the political, economic, socio-cultural background, and with regard to the various legal institutions the historical as well. This is a *sine qua non* in the study of comparative law.

Another interesting feature of the illustrative notes is that von Mehren at times seems to be attempting to initiate in the mind of the student some of those conceptualistic, classificatory, and nominalistic exercises in which we civilians so willingly immerse ourselves, for example, the classification of acts under seal under our concept of unilateral juridical acts, and our concept of abstract promises or abstract juridical acts.[7]

I do not know what the reactions of American students will be to our conceptualistic method nor whether the author has attempted to initiate in their minds these conceptualistic exercises with the subtle and concealed motive of making American students realize the relative value and sometimes the scarce interest of our conceptualizing.[8] If so, I must add that this would also seem to provide a way of letting these students recognize the sometimes extremely theoretical and abstract trends of our jurisprudence, there being little danger that these same students, immunized by the case method, would contract the conceptualistic pathology.

One may also ask whether the book is of any use to us, to the civilians. It is plain that it cannot serve as an independent basis in our courses, given our methods of teaching and the fact that the book is directed to common-law students. But I would say that we need to refer to a book like this in our teaching, first, because it shows us how our problems are seen and understood by a common-law comparatist, and secondly, for the richness of the cases and reference materials found in the book, which might in part also be employed in our courses (naturally courses conducted along seminar lines—without lectures!). Finally, apart from its pedagogic utility, the book is of value for comparatists of civil-law countries. Thus, as to contracts and torts, a field of particular interest to me, I have discovered in it points of view, notes, and informations which have enriched and illuminated my knowledge.

GINO GORLA *

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[7] For example, questions at p. 375; 403–404 on the concept of *"garde de la chose"* equivocally stated in article 1384 of the French Civil Code; 410–411, 413–414, 465–467, 473, 501, 585–586. It seems to me that these and similar questions demand from the student too much effort for putting himself into "civilian" shoes.

[8] On the relationship between our "abstractness," the promissory note, and the act under seal, *cf.* my Il Contratto I, 456–60, also Grisoli, The Bill of Exchange in English Law, Milano, 1957.

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SIQUEIROS, J. L. *Los conflictos de leyes en el sistema constitucional Mexicano.* Chihuahua: Universidad de Chihuahua, Escuela de Derecho, 1957. Pp. 114.

This is a welcome addition to the meagre literature on Mexican private international law. The booklet contains five lectures on the Mexican constitutional law of conflict of laws given at the Law School of the University of Chihuahua by Professor Siqueiros who is professor of private international law at the National University of Mexico in Mexico City.

The lectures center around Article 121 of the Mexican Constitution of 1917 which is the Mexican counterpart to the Full Faith and Credit Clause in the United States Constitution. Whereas the Mexican Constitution of 1857, in Article 115, contained a true copy of Article IV of the United States Constitution, Article 121 of the Constitution presently in force has gone further than the model. In addition to stating the requirement of grant of full faith and credit in all states to the public acts, records, and judicial proceedings of other states and giving Congress power to pass implementary legislation, Article 121 lists a series of basic conflicts rules with which implementing legislation shall comply. While, so far, no implementing law has been passed, these basic rules have become the guiding principles for constitutional adjudication of interstate conflicts. They proclaim the territoriality of legislation, state that movable and immovable property is governed by the law of the situs, deal with the jurisdictional requirements for recognition of judgments in rem and in personam, and prescribe for acts of status in conformity with the law of one state recognition in all states.

The author of the lectures engages in a critical analysis of these basic principles drafted by a person, or persons, unknown. His discussion shows that these principles, in part apparently badly drafted and possibly unsound, have created great difficulties in Mexico. The author refers to—sometimes contradictory—adjudications by the highest court.

In the opinion of the author, Congress should pass implementing legislation, especially on recognition of acts relative to status. The author discusses in the final lecture the draft of an implementing law on status which the late Professor Eduardo Trigueros had prepared in 1948 and which is reproduced at the end of the book.

The discussions contain cross references to American law with which the author appears to be familiar. No reference is made, though, to the—consequential or inconsequential—change made in 1948 in the implementing legislation (28 U.S.C. §1738 (1952)).

As did Trigueros, the author shows concern about the reaction outside Mexico to the mail-order divorce business in some Mexican states. While the courts in the United States have shown little difficulty in dealing with these "divorces," the courts in Mexico do not seem to have been able to arrive, internally, at similarly satisfactory solutions. The author suggests that personal appearance in court of at least one party should be made a requirement. Also, he thinks that when parties go to another state for the purpose of divorcing, the forum should apply grounds for divorce only if available both under the law of the forum and the law of the domicile.

The Mexican experience with the more elaborate Full Faith and Credit Clause deserves the attention of the American lawyer. It would seem to illustrate the difficulties in codifying conflicts rules. The lectures are worth reading.

KURT H. NADELMANN *

* Board of Editors.

DROBNIG, U. *Sammlung der deutschen Entscheidungen zum interzonalen Privatrecht 1945–1953.* Max-Planck-Institut für ausländisches und internationales Privatrecht. I. Halbband (Nr. 1–352). Berlin: Walter de Gruyter & Co.; Tübingen: J. C. B. Mohr (Paul Siebeck), 1956. Pp. xii, 638.

This is the first volume of a new collection which constitutes a parallel publication to the standard collection of German decisions on private international law published by the Max Planck Institut well before World War II (when it was still called the Kaiser Wilhelm Institut). This new collection is devoted to decisions on interzonal conflicts of laws, i.e. to decisions of German courts in the Western Zones of Occupation (and subsequently in the Federal Republic of Germany) on rules emanating from the Soviet Zone of Occupation of Germany, and of decisions of Soviet Zone courts on West German rules. In view, however, of the fact, that there are much wider possibilities to publish court decisions in the Federal Republic, where there exist a multitude of legal periodicals and where there is no censorship to suppress the publication of decisions deemed undesirable by those in power, the collection contains more decisions from West German than from Soviet German courts. These decisions of interzonal conflicts of law are difficult to classify. Obviously, the normal rules on interstate conflicts of laws, as they exist in every federal state and as they also existed in Germany prior to 1945, are hardly applicable to a situation where the two legal systems are animated by diametrically opposed ideals and where there exist no central authorities to act as umpire over such interstate conflicts. However, it would be erroneous to treat these cases simply as decisions on international conflicts of laws. Especially in the early stages of the period covered by the collection, many laws of a nonpolitical character were still common to both zones, and courts on both sides sometimes based their reasonings on the assumption that, after all, they were confronted with rules emanating not from a foreign state but from another German Land. Gradually this feeling had to be abandoned in view of the increasing rift between the two legal systems.

The present first volume is devoted to decisions on general principles (public policy, territorial effects on foreign acts of State, etc.)—personal status —corporations—debts—social legislation—currency law, and exchange control legislation.

IGNAZ SEIDL-HOHENVELDERN

MAKAROV, A. N. *Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts in den Jahren 1952 und 1953.* Max-Planck-Institut für ausländisches und internationales Privatrecht. Berlin: Walter de Gruyter & Co.; Tübingen: J. C. B. Mohr (Paul Siebeck), 1957. Pp. xii, 758.

The present issue of the well-known collection of German decisions on private international law published under the auspices of the Max-Planck-Institut für ausländisches und internationales Privatrecht needs no introduction to anybody who has ever worked in the field of comparative law or public or private international law. It is *the* authoritative source in this field. The presentation follows the traditional line. The entire volume consists of the reprinting, mostly *in extenso,* of more than 320 decisions by German courts without any comment except an occasional "(sic)"—where the views expounded in a decision are really too unorthodox. Each case is preceded

by a headnote outlining the content of the decision. Most of the cases had already been published, although some of them only in such specialized collections as to be hardly accessible even in German university libraries. The headnotes for all cases which were published on previous occasions contain, moreover, a reference to these publications. Some very interesting cases, however, are published here for the first time. The cases are set up according to their main topic—e.g. contract law, family law, etc. At the head of each such title there appear references to those cases which, although published under another title, are none the less of importance also under the present title. Together with a really well-planned index this greatly facilitates the use of the present volume.

The effects of World War II and its aftermath are still apparent in this collection of decisions dating from 1952 and 1953. Thus, some decisions by courts of the Occupying Powers appear in this volume. Many decisions are concerned with the present citizenship of refugees and with the consequence of the German wholesale bestowals of German citizenship between 1938 and 1945, especially in respect to Austria. Still other decisions are on the border between private international law and interstate conflict of laws as they originated during this same period, when—in some fields at least—German, Austrian, or Czechoslovak law were respectively in force in what Germany then considered to be various parts of the Greater German Reich. Many cases concern conflicts of restitution laws. Two cases deal with the legal nature of contracts for the furnishing of goods under the ERP program. Decisions concerning the liability of German branches of foreign life insurance companies for payments made arising from contracts governed by German law, where such payments were not made to the original holder of the insurance policy but to the Gestapo, merit particular interest from the viewpoint of comparative law as similar lawsuits were brought also against the headquarters of such companies before Swiss and United States courts. Many cases are concerned with the refusal to grant extraterritorial recognition to foreign confiscations. The German decisions reported in this volume seem less impressed by the Act of State doctrine than are United States courts. Several decisions upheld the claims of Germans dispossessed of their property in Czechoslovakia, to recover such property, when such property was subsequently found in Germany, albeit not in the possession of the Czechoslovak State. A special aspect of the problem of confiscation arose in connection with the German Law of 1949 concerning the clearance of titles to securities (*Wertpapierbereinigungsgesetz*). Similarly to his Czechoslovak and other counterparts, the United States Alien Property Custodian rightly failed to obtain recognition for his title to securities issued by German enterprises which he pretended to have acquired by confiscation of the certificates concerned. Decisions on the immunity of foreign States vary; however the trend towards granting foreign states immunity only for their acts *jure imperii,* which has recently been adopted as the official policy of the United States State Department, gained more and more momentum also in Germany during the period covered.

IGNAZ SEIDL-HOHENVELDERN*

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SANTA PINTER, J. J. *Sistema del Derecho Anglosajón. Análisis Esquemático.* Buenos Aires: Roque Depalma Editor, 1956. Pp. xii, 162.

SANTA PINTER, J. J. *Sistema del Derecho Soviético. Análisis Esquemático.* Buenos Aires: Roque Depalma Editor, 1957. Pp. xiv, 134.

For the common law scholar Professor Santa Pinter's books are of interest primarily for the light they throw on the view of a civil law scholar on what he finds necessary of explanation in the two legal systems which are thought by most jurists to provide the major contrast to the law of Latin America and to the civil law world generally. Neither book is extensive, for both are conceived in the author's words as descriptive and not as critical studies. The author is obviously more at home with the common law system than with the Soviet, for he has studied in Canada and uses English with ease, while he has never been to the U.S.S.R. and admits that he has been hampered in his examination of the Soviet system by his lack of the Russian language.

Professor Santa Pinter puts himself in the school of comparatists which sees the major difference between the common and civil law systems to be the manner of thinking employed by each system, and not in the substantive rules themselves, which he finds it easy for a civilian to comprehend. He is attentive to the development of law through judicial practice rather than through the rational thought of legislatures expressed in codes. He sums up his thought with the words, "The unique difference may consist (and consists) of the divergence in the forms and in the development of both systems." In keeping with this analysis, he devotes most of his book on the English law to its history, with special reference to equity which he believes to be the hardest branch of English law for his colleagues to understand.

To explain his subject, the author has found it necessary to discuss the system of legal education in England, and here he permits himself a little criticism. He finds it hard to understand why Maitland said that adjective law must be studied in the courts and not at the universities. He believes that the theory of procedure, its fundamentals, its general principles and concepts can and must be taught in the universities.

The second part of the volume is of a different order. It treats of detail in the British Commonwealth and the United States. It departs from the magisterial exposition, and picks out detail, not always with the best results, for it appears to be too spotty a selection to produce any rounded picture. He introduces a few facts on specific law schools in Canada, on the federal structure of Canada and the United States, on the system of courts in each country, but then he adds in his principal text a very limited list of law review articles on Canadian law, which might better have been appended to his general bibliography at the end of the book.

The United States is treated very briefly, and primarily in terms of its legal institutions. He is much struck by the aristocracy which he, like de Toqueville, finds created by the legal profession in the United States. His conclusion is that the common law is a single system which has undergone variations of secondary importance depending upon the varying circumstances and conditions of time and place. He gives only a passing glance to the influence of a written constitution upon American jurisprudence and thus treats lightly what may be one of the primary elements of difference underlying the English and American systems.

The volume on Soviet law is better organized to provide a rounded picture of the system than is the companion volume on the common law. The author properly approaches the Soviet system as readily comprehensible to the civilian because of its civil law origin. It is a code system with Roman law concepts which provide a common base for understanding. What he does find exciting is the influence upon this base of the communist regime with its monolithic state exercising unscrupulous politics and presenting extremes of regulation and drastic penalties.

Professor Santa Pinter approaches the problem of exposition in a primarily formal manner of description of provisions in successive articles of the codes. To the comparatist this is itself revealing, for it suggests that to a civilian an essentially civil law form used in another country is treated in traditional style, which means without reference to practice. The exciting feature of the Soviet system is the application of Roman law concepts to a completely different type of economic life. This difference, while present in some key sections of the Soviet codes, is demonstrated most clearly in an examination of Soviet judicial decisions. It is here that traditional forms take on different meanings, yet judicial practice was not available to Professor Santa Pinter. He regrets that he was limited in finding it because of the language barrier. Thus, he defines the labor contract as it is defined in the code of labor laws, but he says nothing of Soviet rejection of this definition in present circumstances, even though the article concerned is not amended. He is likewise limited in his explanation of the criminal law's article on "analogy" because the real meaning of this article appears in court decisions.

Professor Santa Pinter's book on the Soviet system cannot be judged fairly by comparing it with the work that has been done in English, for scholars in England and the United States have conducted extensive studies for years. It must be judged by comparison with the French, Italian, and Spanish studies. Except for the relatively recent work of Professor René David at Paris, the Latin world has done little to examine the functioning of Soviet law, and Professor Santa Pinter's little book can claim a place as a pioneer on a very short shelf of studies. It has value as an introduction. Let us hope that it will be the forerunner of more detailed studies of the functioning Soviet system, since this system is comprehensible to the westerner only as a functioning whole and not by exposition of the provisions of its codes alone.

JOHN N. HAZARD *

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DORAT DES MONTS, R. *La cause immorale.* (*Étude de jurisprudence.*) Preface by H. Mazeaud. Paris: Librairie Rousseau, 1956. Pp. xii, 173.

Immoral situations frequently encountered in judicial practice, such as concubinage, matrimonial brokerage, prostitution, and gambling, have been chosen by the author for a study of the practical application of the notion of immoral *"causa"* (Arts. 1131, 1133, C.C.), the French counterpart to our concept of immoral consideration. The lack of an authoritative definition of both immorality and *"causa"* makes the subject of this study particularly interesting.

In a systematically attractive manner, we are conducted through the five chapters of the book, dealing respectively with the concept of *bonos mores,* the notion of *"causa,"* the proof of immoral *"causa,"* the invalidating effect of such *"causa,"* and a general recapitulation, followed by a conclusion.

Dr. des Monts is a diligent student, and thus a bit repetitious. In a clear and forthright fashion, he draws the general lines of his subject but avoids following all the subtle nuances of the cases reviewed. An earlier colleague of his, Dr. Dechezelles, whom he ignores, wrote a thesis on the same topic (limiting himself to concubinage) in 1933, and was markedly more intensive and perceptive.

In addition to reducing French cases to their last common denominator, the author shares and expresses strong incidental jurisprudential views. He implies that the state ought to go a long way in protecting morality by positive means, i.e. by investing most moral commands with a legal *fiat.* Thus, he favors a more extensive invalidation of jural acts on the ground of immorality. What makes his views even more strict is his insistence upon judging morality according to the Christian rather than the "sociological" standard. Although many legal writers subscribe to such a view, some discussion of its rationale would not have been superfluous, since in post-Kantian moral theory there lingers some doubt of the value of enforcing moral commands by authoritative measures.

In the discussion of the notion of *"causa,"* the preference of the author is even more dogmatic. He takes it from the prophet's mouth that not only is such notion useful as a separate formal legal concept, but, also, that it should be burdened with the dual function of assuring the seriousness and equilibrium of jural acts *and* of authorizing a grand inquisition into the immoral motivation of the parties.

To open the Pandora box of the various theories on *"causa"* is never a prudent thing to do; but it cannot be helped if we really want to take a stand on this matter. In international legal science, there has been some doubt of the technical values of the notion of *"causa."* In a number of modern legal systems, especially within the sphere of German legal influence, *"causa"* has been discarded as a formal requirement of the validity of jural acts, not because in principle anti-causalistic views prevailed, but because it was thought that this notion caused a great deal of confusion while being dispensable. Its function was usually taken over by allowing a more flexible interpretation of the element of consent. The Swiss *"théorie de la confiance"* in particular, attaches to this consent a number of *Voraussetzungen,* i.e. implied conditions, thus satisfactorily covering the most important gap left open by doing away with *"causa,"* the need to preserve some bilateral "equivalence" of the obligations in nongratuitous acts, which is very important in determining the consequences of frustration of jural acts.

Moreover, whatever the answer to the question of preserving the formal entity of *"causa,"* guaranteeing the "equivalence" and preventing the immorality of jural acts by means of one and the same legal standard, has not always met with general approval. Many have felt that there is little conceptual connection between these two functions to call for a uniform approach. Even in France, where the prevailing view regards *"causa"* both as

the objectified purpose of bilaterality or unilaterality and as the actual determining motive of the parties, the 1947–48 Draft of the new French Civil Code followed the path of separate treatment (Arts. 37–38 and 39–40).

In general, the present work would have profited greatly from a wider comparative orientation and a more intense theoretical discussion.

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JACQUEMART, D. *Le Conseil d'État—Juge de Cassation*. Preface by Roland Drago. Bibliothèque de Droit Public, Tome XIII. Paris: Librairie Générale de Droit et de Jurisprudence, 1957. Pp. viii, 286.

The present volume is in essence a monographic study of cases in which the Conseil d'État, the supreme French court in matters of public administration, reviews rulings of lower administrative tribunals organized for specialized matters, as contrasted with cases when decisions of administrative authorities are considered by the administrative judiciary.

The mental process followed in the book does not leave any doubt that the author adheres to the idea that not only the Conseil d'État but also all French administrative tribunals of lower degree are part of the judicial and not of the executive branch of government.[1] Accordingly, the author considers the sharp procedural distinction fully justified that the reform of administrative judiciary carried out by the decree of September 30, 1953, makes between cases when the Conseil d'État reviews rulings of administrative tribunals, and instances when it considers decisions of the Executive.

In matters decided by lower administrative tribunals, the Conseil d'État exercises its authority upon a request for cassation (*pourvoi en cassation*). Decisions of administrative authorities may be brought before the administrative judiciary by various other types of requests. Of these, the *recours pour excès de pouvoir* (recourse against an administrative organ for exceeding its legal authority) are the most important. Since the reform introduced by the decree of September 30, 1953, lower administrative tribunals of general jurisdiction have authority for the latter, and the Conseil d'État decides upon a *recours pour excès de pouvoir* only if the request is directed: 1. against an administrative act supposed to be applied in a geographic area extending beyond the one for which a lower administrative tribunal was given authority; 2. against an act of the President of the Republic or the Chairman of the Ministerial Council. On the other hand, the Conseil d'État is exclusively competent to rule upon a *pourvoi en cassation*.

The author rightly asserts that, due to the recently adopted solutions, the question is of great practical importance whether a legal remedy is sought against the decision of an administrative tribunal or that of an executive authority. Simultaneously, he thinks that, in the present status of French law, it is evidently no more justified to speak in scholarly publications about the

[1] The idea was propounded extensively and a solution was given in the same sense by Durand, C. in his book: Les Rapports Entre les Jurisdictions Administrative et Judiciaire, Paris, 1956, volume II of the Bibliothèque de Droit Public; reviewed in 7 The American Journal of Comparative Law (1958) at 412.

"agony" of the *pourvoi en cassation,* as asserted by Professor Liet-Veaux of the Faculty of Law of the University of Rennes, who held in an article (Recueil Sirey, 1947. III. 49) that the notion of *excès de pouvoir* can absorb every case when the Conseil d'État is requested to annul any sort of decision in matters of administrative law.

Yet, Mr. Jacquemart makes it clear that, in many cases, it is by far not easy to find out whether the decision to be attacked before the administrative judiciary is of a judicial or of an executive character. A vast number of specialized authorities subject to the control of the Conseil d'État were set up during the last four or five decades, and, in several cases, the legislative branch of government "created organs of a judicial type without being aware of doing so."[2] Vague, inexact, or equivocal terms used in several instances by the legislator made it the task of the Conseil d'État and legal doctrine to determine whether the legislative act intended to create a judicial or an executive organ or function. The difficulty increases due to the fact that often the same organ performs both judicial and executive activities.

To solve the problem it is of prime importance, according to the author, to find and follow a precise definition of a judicial act. He refuses to base it on formal criteria, *e.g.* on the independence of those deciding the matter in question; the order for an elaborate (possibly public) procedure providing, among other things, free access by the parties to the files of the case; permission to be represented by counsel; the obligation to expose the motives of the decision in the ruling; etc. Instead, he thinks that the material character of the act must be considered as decisive. His conclusion is that we are confronted with a judicial decision if it was rendered after statements regarding an alleged infringement of the law, committed in the past and by another person (p. 61). The author considers no other acts as judicial.

The definition given above is preceded in the book by the review of the legal theories of Carré de Malberg, Kelsen, Merkl, Duguit, Jèze, and others, and is followed by an extensive survey of the corresponding rulings of the Conseil d'État. As presented by the author, they indicate that the Conseil, in general, persistently looks for material criteria in order to determine the judicial or other character of the act attacked before the Conseil. This does not mean that the administrative high court of France does not take into account procedural guarantees and other formal criteria established in statutes or other sources of law in order to find out whether the legislator intended to create a judicial or an executive organ. However, even if there are no such guarantees in statutory provisions, it does not follow necessarily that the Conseil d'État should refuse to consider the organ in question judicial in character.

On the other hand, the Conseil d'État, in several instances, compelled authorities which it considered as judicial to follow due legal procedure even if this was not expressly required by statutory provisions. This was done precisely by making use of its cassatory authority, and by referring to general principles of law often based on elaborate provisions of civil procedure to

[2] *Cf.* Jacquemart, at 33, quoting a statement by M. Jourdain, reported by M. Montané de la Roque, "Essai sur la responsabilité du juge administratif," Revue de Droit Public (1952) 609.

be followed by the regular courts. Of course, the court resorted to the application of the principles of legal analogy rather than to considering these as direct rules to be accepted by administrative tribunals.

The author, on several occasions, confronts the rules of procedure and the jurisprudence of the Cour de Cassation as well as the principles followed by the Conseil d'État in cases of *recours pour excès de pouvoir* with those applied by the latter in cases of *pourvoi en cassation*. He underlines that the Cour de Cassation and the Conseil d'État acting both in matters of *pourvoi en cassation* and in matters of *recours pour excès de pouvoir* possess rather annulatory than reformatory powers.

The principle of res judicata finds application both before the Cour de Cassation and the Conseil d'État in matters of *pourvoi en cassation* in the sense that the determination of facts in decisions of lower courts is to be taken as granted and the control of the supreme judicial authority is restricted to the legal aspect of the case. Thus, the highest court's decision stops at controlling the legal qualification of facts, without appreciating whether they may be considered as sufficient in themselves for justifying the lower court's decision, while, in matters of *recours pour excès de pouvoir* the Conseil d'État controls the facts established by decisions of executive organs in a much more extensive way.

The jurisprudence of the Conseil d'État in matters of *pourvoi en cassation* is still characterized by great subtlety. This is true especially with regard to administrative tribunals whose construction does not contain adequate or sufficient guarantees for an independent and unbiased judiciary. The most outstanding instance in this respect is that judicial decisions made by administrative tribunals formed within professional corporations to rule upon disciplinary or other behavioral cases of members of the corporation are controlled by the Conseil d'État to an extent practically equal to the control of the executive organs upon a *recours pour excès de pouvoir*. Notably, the Conseil scrutinizes whether the facts established by the lower court are "of a character" (*"de nature"*) to justify the legal subsumption.

Two examples seem to be useful as illustration. Both were cases in which the Conseil d'État overruled decisions of professional tribunals deciding upon the behavior of the defendant during the German occupation in World War II. In the one case, the Conseil stated that the mere fact that the defendant kept a pocketbook containing names of participants in the "resistance movement" was not sufficient to apply sanctions against him if the keeping of the pocketbook neither aimed at, nor resulted in revealing the participants of the movement to the enemy. In the other case, the lower court established the simple fact that the defendant developed an "antisocial attitude" without giving any details. The Conseil d'État in turn found this statement insufficient. The author considers such legal practice fully justified due to the fact that the members of professional tribunals belong to the same profession as the defendant and thus the danger exists that they may be influenced by professional bias (fear of competition, etc.) or at least that they may be overzealous in the protection of what they consider to be professional standards to the prejudice of fundamental human rights.

All in all the book of Mr. Jacquemart is of great value to the development of legal doctrine, as well as in assisting practicing lawyers in the application of law. A select bibliography and an analytical index is attached to the book.

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KAPPELER, D. *Les Réserves dans les Traités Internationaux.* Basle: Verlag für Recht und Gesellschaft, 1958. Pp. xvi, 101.

The present book deals with a very topical problem of international law—the rules, if any, governing reservations to international treaties. It is a regrettable fact, that even that part of international law which relates to the technical rules on the conclusion of treaties has become a subject of bitter political controversies. Yet, in this field, there are hardly any more serious interests to be satisfied than the self-satisfaction that a state may draw from the fact that it has possibly become a party to a treaty. It is indeed immaterial what rules on reservations will prevail. Even if the communist states should succeed in pressing through their contention that their concept of "sovereignty" entitles them to adhere to treaties under any reservation they choose to make—they would not be much advanced if other states should treat them virtually as nonparties to the treaty concerned. The communist states should not be able to contest the legality of such action, which could easily be justified as being based on the same concept of "sovereignty."

However, in spite of the fact that the practical value of any reform will thus be more than doubtful, the classical rules concerning reservations to international treaties have been subject not only to this most far-reaching attempt of modification, but were also abandoned to some extent by a set of rules adopted by the South-American states and by still other rules set up by the International Court of Justice in its Advisory Opinion concerning reservations to the Genocide Convention. Kappeler gives a survey of the historical development of these various sets of rules; he then discusses the various techniques of making reservations and subsequently gives a thorough analysis of the legal problems involved. In view of the fact that these topics are so closely interwoven, he does not always succeed in keeping them strictly apart —but it would be unjust to hold this against him, as this task is practically impossible. The analysis of the various problems which result from the adoption of any of the theories concerning the legal nature of reservations (these may be reduced to the questions whether reservations should be deemed to be contracts or unilateral declarations) are very thorough indeed. The author could almost be reproached with pushing these investigations too far,—i.e. beyond what will ever become practical in interstate relations, for instance, in his discussion of reservations to bilateral treaties.

Kappeler devotes relatively much space to deplore that international law is actually undergoing basic changes. As long as no clear-cut new international law has emerged from the present chaotic state of affairs he is willing to consider reservations to treaties as a necessary evil (*un pis-aller*). I would be unwilling to be quoted as holding that nothing is wrong with present-day international law—but I wonder whether Kappeler is not overestimating

present-day developments. Did not Goethe already complain in his Faust that old laws are carried on beyond their time while there are as yet no new laws to meet new conditions? To some extent any lawyer will always feel that he is living in a period of basic changes.

Moreover, reservations to treaties began to be made at a time which Kappeler considers as a period of stability of international law. I therefore doubt whether any international law of the future would be able to dispense with this institution the utility of which has been proved in a very respectable number of cases—even in periods of relative stability of international law. Therefore, even if we would accept Kappeler's view, that we are living in a period of transition I assume that reservations to international treaties would still continue to be with us as a "necessary evil" even when this period should have come to an end one way or another.

Kappeler, at the end of his book, tests the various solutions proposed, especially as to whether they could easily be applied in practice. He contends that all proposals made up to now to reform the classical rules concerning reservations fail this test. He therefore comes out in favor of a return to the classical pre-World War II rules on reservations, as laid down in the proposals made by the Harvard Law School in 1935.

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CLARK, G.—SOHN, L. B. *World Peace Through World Law*. Cambridge, Massachusetts: Harvard University Press, 1958. Pp. 540.

Hardly any problem dealing with international law and organization has received more attention in the last few years than that of the revision of the United Nations Charter. The general understanding is that it needs amendments, with doubts expressed by some whether the time is appropriate to change it now. Most criticisms have been directed to some particular supposed shortcomings of the Charter, and first of all—to the right of vetoing the decisions of the Security Council. Only a few have suggested a more comprehensive revision of the structure of the international community.

The Clark-Sohn proposals have two outstanding features. The first important feature of the mature conclusions of the authors, long keen observers of the United Nations and experts in international law and organizations, laid down in *World Peace Through World Law*, is their comprehensiveness. To achieve peaceful co-operation between nations it is insufficient to suggest making an isolated step in one direction, even if it be the right one. Thus, it is insufficient to proclaim disarmament and to forbid states to have recourse to war. "The necessary corollary of such prohibition must be the assurance that every state can get justice by peaceful proceedings."[1] Different problems which the international community is facing are interrelated, and in order to achieve the goal of having peace through law, the revamping of the pattern of relations among nations must proceed on a large scale.

In effect, the authors offer a thoroughly revised text of the Charter of the

[1] Wagner, Is a Compulsory Adjudication of International Legal Disputes Possible? 47 N.U. Law Rev. 21, 22 (1952).

United Nations, juxtaposed with the old one, largely glossed, explained and commented, preceded by an enlightening introduction, and followed by annexes. In spite of the scores of changes to the structure of the United Nations that the authors suggest, some of a fundamental nature and some trivial, the old text of the Charter was retained as much as possible, whenever it did not conflict with the basic assumptions of Messrs. Clark and Sohn. And at this point, the other outstanding feature of the work must be emphasized: its realism. The authors are cautious not to make idealistic proposals which, good as they may be, have no chance of being adopted at the present stage of the development of humanity. The so-called "sovereignty" of the states is recognized, and is abridged only as far as it is necessary to achieve the paramount purpose of the organization of nations: the replacement of violence in international relations by settling disputes by peaceful means.

In this respect, the authors may even appear to be too conservative. In the present Charter of the United Nations, the word "sovereign" or "sovereignty" is used just once, in Art. 2, which states that "[t]he Organization is based on the principle of sovereign equality of all its members." If taken in its literal meaning, "sovereign" denotes "supreme." Thus, it could be argued that the Charter speaks about supreme, or perfect, equality of states. The Charter does not expressly recognize that its members are "sovereign," although it does so implicitly, and nobody could contend that sovereignty was intended to be eliminated. In spite of the fact that the whole idea has been often administered severe blows by the actual practice of nations, and that all outstanding modern international law scholars have demonstrated its senselessness and dangerousness,[2] states cherish the idea that they are omnipotent and stick to it. Messrs. Clark and Sohn, realizing that nations are touchy on the point, state, in their text of Art. 2, that "There are reserved to all nations or their peoples all powers inherent in their sovereignty";[3] they hasten to add, however, that some of these powers "are delegated to the United Nations."[4]

The authors make it clear that the scope of authority delegated to the United Nations will be very restricted: it must be limited, for the time being, to "matters directly related to the maintenance of peace."[5] Responsibility for the maintenance of peace and the enforcement of disarmament lies in the General Assembly, according to the proposals of Messrs. Clark and Sohn. The place of the present Security Council is taken by a new body, the Executive Council, which is more comprehensive and includes seventeen representatives elected by the Assembly. Each of the four largest nations (China, India, the United States, and the U.S.S.R.) are to be represented on the Council; four of the eight next largest nations would also be represented in rotation. The right to veto its decisions would be eliminated; there would be substituted a qualified majority vote. The important organs of the organization, such as the Economic and Social Council and the Trusteeship Council would be continued, and a few others would be called into being.

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[2] See, e.g., Scelle, Droit International Public (1944); Jessup, A Modern Law of Nations (1949).

[3] P. 6.

[4] *Id.*

[5] Introduction, at XIII.

Peaceful settlement of international disputes, the paramount aim of the Organization, would be achieved by three important devices, strictly interrelated: disarmament, a world police force, and an international judicial system.

Annex I to the Charter lays down a plan for the complete elimination of national armed forces. Full disarmament is suggested to be achieved over a period of ten years (plus two preparatory years), by reducing each year the strength of the armed forces by ten per cent. This process would be supervised by a special Inspection Commission.

Annex II to the Charter provides for the organization and maintenance of the United Nations Peace Force, which would supervise the abidance by the nations of the pledge not to resort to violence in international relations. It would consist of volunteers, full-time career soldiers, numbering from 200,000 to 600,000, as determined by the General Assembly. A Peace Force Reserve is also provided for.

The world's judicial system would consist of one supreme tribunal, the International Court of Justice, to adjudicate cases of legal nature; of a World Equity Tribunal to pass on nonjusticiable disputes; and of a set of regional United Nations Courts as well as a World Conciliation Board.

The authors, well aware of the importance of a steady, well-balanced budget, call for a comprehensive fund-raising system and a budget amounting to two per cent of the gross world product. Although the estimated contributions of the nations may seem high, they would amount only to a fraction of their present expenses, most of which are wasted in the armament race.

A most important problem, in all international bodies, is the one of representation. The traditional absurd rule of not only legal, but also factual, equality of states, leading to the rule of one vote for each nation, must be replaced by a more reasonable one. Iceland or Luxemburg cannot be treated as entitled to the same voice in international matters as the United States or the U.S.S.R. In one of his previous publications, Professor Sohn gave a review of different proposals on how to distribute the voting power in the future world organization.[6] Different factors could be taken into consideration, the most important being population and the national industrial potential. In the new book, Messrs. Clark and Sohn recognize the difficulty of basing the number of representatives from the several states in the world organization on any other consideration than their number of inhabitants. They would give one representative to the smallest nations, and thirty to each of the four biggest, having more than 140 million inhabitants. The authors point out the inherent reasonableness of this approach. In one respect, however, the plan seems to be deficient. It does not provide for a gradual increase of the number of representatives according to population, but it proceeds by stiff brackets; thus, a nation of from 5 to 20 million people would have 5 representatives in the General Assembly; nations in the 20 to 40 million bracket would be entitled to eight; those having up to 140 million would be represented by sixteen. There does not seem to be any necessity for such a procedure, and it is hardly conceivable that Eastern Germany, Yugoslavia or Argentina, each having

[6] Sohn, Cases and Other Materials on World Law (1950).

nearly 20 million inhabitants, would consent to having the same number of representatives as Iraq or Switzerland, which barely pass the borderline of five million.

This seems to be the chief proposal of Messrs. Clark and Sohn which merits criticism. A few minor points may raise some doubt, such as, e.g., the suggestion that appeals from the regional international tribunals to the International Court of Justice should be only in cases of special importance instead of being permitted as a matter of right,[7] and that appeals from the decisions of the Executive Council may be brought directly to the International Court of Justice, by-passing the General Assembly.[8]

The new United Nations would not make its membership mandatory on all nations; however, it would become effective only upon being accepted by a qualified majority of the states, including all the large nations, and there would be no right to withdraw or to expel a member.[9] Thus, practically, universality would be achieved. Here again, by not providing for compulsion, the authors take national susceptibilities into consideration.

In providing for a system of control over the doings of the nations, the authors proceed on the assumption "that mankind has not yet reached the stage at which any nation can be trusted . . . to observe even the most solemn agreement to refrain from violence."[10] There lies the crux of the whole problem. The nations cannot be trusted. If it can barely be expected that nations would observe their agreements, can it be hoped that they will relinquish some of their powers deriving from their "sovereignty" and agree to a plan under which they would be *forced* to abide by their agreements? The future, and probably a not-too-distant one, will answer this question.

W. J. WAGNER *

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[7] P. 41; p. 323, point 5.
[8] Art. 25 at 73–74.
[9] Art. 6 at 16.
[10] Introduction, at XXI.
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# Book Notices

WILDING, N.—LAUNDY, PH. *An Encyclopedia of Parliament.* Foreword by The Rt. Hon. The Viscount of Malvern. New York: Frederick A. Praeger, Publishers, 1958. Pp. x, 705.

As pointed out in the foreword by Viscount Malvern, former Prime Minister of the Federation of Rhodesia and Nyasaland, and himself a "Member of Parliament for many years," this book represents the first attempt to present a wide range of parliamentary information in the form of an encyclopedia. To the compilation, writing, and editing of the volume, the authors have brought their expertness in matters parliamentary and legal, as well as their experience as librarians; Mr. Wilding as the librarian of the House of Commons, and as of 1949 as the librarian of the Legislative Assembly in Southern Rhodesia and the first librarian of the newly created Federal Assembly, Mr. Laundy, his successor as the librarian of the Parliament of Rhodesia since 1954. Although the authors modestly ask to be forgiven for their "temerity in producing this book in a relatively remote outpost of the Empire," they feel with reason "justified in claiming that [they] have collected into one volume a wealth of fact which is otherwise obtainable only from a numerous assortment of other publications." The headings within the alphabetical sequence cover the various phases of legal history, taught as the struggles between Parliament and Crown, grouped under the names of those sovereigns under whom these very struggles raised parliamentarism to its present form of democratic government (Elizabeth I, pp. 169–179; Cromwell, pp. 125–136; Charles I and Charles II, pp. 67–86; Victoria, pp. 582–593). Other entries extend, still within the framework of legal history, to present constitutional problems, as for instance, those covering Delegated Legislation (pp. 143–145) and House of Lords Reform (pp. 278–280) with the addition of indicating the latest pertinent literature on the topic, e.g., Lord Hewart's "New Despotism," and Professor C. K. Allen's "Law and Orders." Naturally, the history of the Conservative and Labour parties, as well as that of the various Parliaments (Australian, Irish, South African), is covered with equal succinctness as are the numerous technical details, as, for instance, voting, elections, procedure, debate, etc., connected with the working of Parliament. In addition to offering delightful reading, the volume is extremely valuable for purposes of reference, its perusal facilitated by excellent printing, paper, and binding.

V. B.

JACQUIGNON, L. *Le régime des biens des entreprises nationales. Contribution au droit des nationalisations.* Vols. I, II. Introduction by C.-A. Colliard & A. Mathiot. Preface by J. Boulouis. Essais et Travaux, Université de Grenoble. Paris: Librairie Dalloz, 1956. Pp. xii, 363, 675.

The present volume is a remarkable new contribution by the University of Grenoble towards the study of French nationalization laws. A short time since, this same University published the reports of a symposium held at Grenoble in 1955 at which this same subject was discussed by eminent teachers of the various French law faculties as well as by leading representatives of the French nationalized industries. The present volume is a doctrinal treatise on this very topical question. It has the merit of coming from an author who has acquired large insight into the practical problems involved, holding at the same time responsible positions in the nationalized French

electrical industry. Scholarly research thus coupled with practical experience leads to very interesting results. The author deals only with French nationalizations—a subject certainly vast enough in itself, especially as there exist hardly any other works on this subject. We therefore would be unjust to regret, that he did not extend his researches to the field of comparative law. Recently, efforts have been made by UNESCO and the International Association of Legal Science to effect such researches on a world-wide basis. (Symposium held at Rome in February 1958.) These efforts aim at lessening international tension by studying means of economic coexistence between states with full-scale nationalization and states upholding free enterprise. The experiences of France, where a nationalized sector coexists with a more or less free-enterprise economy will be particularly valuable in this respect—as would be similar British or Austrian contributions. It is the merit of the author that this information—so far as France is concerned—is now easily accessible and doctrinally explored. It will of course be a handicap to any comparative study in this field that so many aspects of nationalization are linked to typical phenomena of domestic administrative and constitutional law which are unparalleled in other countries—let alone the political philosophies and practical politics motivating, defending, or attacking nationalizations. (For instance, a study of the behavior of the former "USIA"—Enterprises in Austria, would be highly intriguing, which for 10 years worked under Soviet management in basically free-enterprise Austria.) Be this as it may be, the author and his University are to be congratulated on a magnificent piece of work, that merits attention beyond the limits of France by all scholars interested in the comparative aspect of this problem.

IGNAZ SEIDL-HOHENVELDERN

*Die Entwicklung des sowjetischen Strafrechts und sein Einfluss auf die Rechtsprechung in der Sowjetzone.* Verhandlungen der 10. Tagung des Königsteiner Kreises. Göttingen: Otto Schwartz & Co., 1956. Pp. 87.

This booklet contains an account of the Proceedings of the 10th Session of the Königsteiner Kreis (October 14–15, 1955), the theme of which was the development of Soviet criminal law and its impact upon the jurisprudence of the Soviet Zone of Germany.

There were two papers presented at the Session. The first one, by Professor Maurach, dealt with the socio-political foundations of Soviet criminal law, whereas the second, by Professor Lange, centered around the application of the content and form of Soviet criminal law in the jurisprudence of the Soviet Zone of Germany.

In his treatment of the socio-political foundations of Soviet criminal law, Professor Maurach draws the reader's attention to the fact that criminal law shared the fate of all other legal institutions of the Czarist régime. There was no reconstruction, but a destruction of the existing order, and the emergence of a new socialistic order. Since bolshevism conceived of law as a system of social relationships corresponding to the interests of the ruling class, it was self-evident that the new Soviet criminal law had to serve as a weapon in the hands of the present ruling class, the proletariat, and that its main task was to ward off all undertakings which were considered dangerous to this class. Set against this background, Professor Maurach traces the main phases of the development of Soviet criminal law through the periods of War Communism, the New Economic Policy, the Era of Re-socialization, and mentions some of the more recent changes in the law.

Professor Lange's discussion emphasizes that the basic aim of the

present rulers of East Germany is the faithful copying of the Russian system in the field of the administration of justice. He points out that criminal law in the Soviet Zone constitutes a step backward of about 80 years and a retrogression of several epochs in the history of ideas from Liszt to Feuerbach. In contradistinction to the period immediately following the end of the Second World War which corresponds to the era of revolutionary legality of the Russian War Communism, and which is characterized by a kind of legal nihilism, the more recent developments in East Germany show a return to the science of law, in the sense that science is understood there. Within this broad framework, Professor Lange goes on to show the strong dependence of the criminal jurisprudence of the Soviet Zone on the Russian system and concludes that, in this respect, no radical changes can be expected in the near future.

Despite the complete lack of annotations and documentation, the two papers as well as the accompanying discussions present the reader with a brief but interesting account of the socio-political setting and some of the highlights of the developments of Soviet and East German criminal law and jurisprudence, and may be read with benefit by specialists and general readers alike.

STEPHEN GOROVE

CORWIN, E. S. *The President. Office and Powers, 1787–1957. History and Analysis of Practice and Opinion.* 4th rev. ed. New York: New York University Press, Pp. xiii, 519.

A fourth edition of a work first published in 1940 and then succeeded by later editions in 1941 and in 1948 would normally call for only the briefest and most formal acknowledgment of the latest modifications or additions made by the author to his text. Corwin's study is, however, the classic work in its field, and in addition the nine years between the third edition and the present, fourth, edition saw substantial changes in the working practice of the office of the Presidency of the United States, a consequence in part of the changes in personality and philosophy of the successive incumbents of the office during that time-period—Mr. Truman had just taken over from Franklin D. Roosevelt after all, and he was followed in turn by General Eisenhower—and in part of the unprecedented problems presented by the recurrent crises of the Cold War era. In this latter context one need only think of the constitutional *cause célèbre* engendered by President Truman's attempted taking over of the steel industry during the Korean War emergency, and of the dilemma presented for both President Truman and President Eisenhower by the general obstreperousness, frequent arrogance, and occasional downright intolerance, of Congressional investigatory committees,—a situation to which each man reacted, as president, in characteristically different ways.

Professor Corwin's work is enriched, in academic-value, by its substantial documentation and references to primary and secondary source materials. Perhaps because of the very thoroughness and scholarliness with which he has canvassed all accepted authorities, Professor Corwin is not afraid to express his own opinions in an area in which, because so little is positive law of the constitution and so much simply matters of constitutional usage, custom, or convention, forthright comment and appraisal, and evaluation are badly needed. It should be remarked, for the benefit of foreign readers, however, that Professor Corwin has something of a Jeffersonian-bias in his approach to the Constitution, and there are some indications, in his general philosophic attitudes towards the governmental processes, of a latter-day, classical (triadic) separation of powers-type

preference for the actual working of the Constitution. He is, in any case, clearly opposed to an expansionist judicial power, whether in the cause of liberal "activism" or anything else, a position that has led him in recent years, with complete intellectual consistency, to deplore, for example, both the absolutism in the Supreme Court's striking down of President Truman's steel industry seizure of 1952, and also the "too ebullient displays of energy" by the Court in its Spring, 1957, term when, in a group of major decisions, it at last administered a check to the remnants of McCarthyism and the more irrational Cold War security drives in Congress. In this latter respect, he would base his criticisms of the Court's interventionism, as expressed in the *Watkins* and *Jencks* decisions, on grounds of constitutional history, remote from the bitter partisan controversies of the 1950's: "It seems to me extremely unlikely that Congress will consent, in the long run, to see this great primal power [i.e. Congress's Investigatory power], an inheritance from the Mother of Parliaments, kept long in judicial leading strings. Its history to date forbids the idea" (p. ix).

EDWARD McWHINNEY

DE GRAZIA, A. *The American Way of Government. National, State, and Local Edition.* New York: John Wiley & Sons, Inc., 1957. Pp. xvii, 971.

Professor de Grazia of Stanford University, in this admirably-printed text, has presented a very useful introduction to the basic structure and organization of the American constitution and system of government. The emphasis throughout is, not on any abstract study of formal authority, but on actual working processes of law and administration. The clarity of style and presentation throughout make this book very useful for foreign students who are just beginning the study of American constitutional law. The complete absence of foot-noting and other documentation of source materials, in the main text, is partly compensated for by an extensive bibliography at the end of the volume.

EDWARD McWHINNEY

RUTLAND, R. A. *The Birth of the Bill of Rights, 1776–1791.* Published for the Institute of Early American History and Culture. Chapel Hill: University of North Carolina Press, 1955. Pp. vi, 243.

This is a useful chronicle of the events leading to the adoption of the Bill of Rights by the various States and in the first ten amendments to the Federal Constitution; preceded by a concise summary of the English and colonial background. Limited to the Anglo-American experience, the monograph neither interprets the Bill of Rights in the general framework of previous constitutional discussion in Western Europe nor explores the later parallel developments in France and other countries.

H. E. Y.

*United Nations Textbook.* (3rd ed.) Compiled by the "Professor Telders" Study Group for International Law at Leiden University assisted by Dr. F. M. Baron van Asbeck and Dr. J. H. W. Verzijl. Introduction by M. O. Hudson. Leiden: Leiden University Press, 1958. Pp. xx, 442.

This handy little volume contains the text of the most important UN Documents with annotations (inter alia, UN Charter, HQ Agreement, UN Staff regulations, Statute of the ICJ, as well as the rules of procedure of various UN organs). It reproduces, moreover, texts of regional treaties, inter alia the Statute of the Council of Europe, the OEEC Convention, and the Treaty establishing the European Steel and Coal Community. Of some less important documents, only well-selected excerpts are

reproduced. A useful feature of the book is also its key to the main symbols of UN documents. The authors spared no effort to get as representative and complete a selection of documents into this volume as is humanly possible. Some of the documents reproduced in this book are not easily accessible in other publications (UN rules of procedure or UN Staff Regulations), while for some other documents (e.g., Warsaw Pact, Treaty establishing the ECSC) there exists no official English text.

The fact that this is already the third revised edition of this collection, published since 1950, is ample proof of its utility for students and scholars alike.

If I may add a modest suggestion towards improving the subsequent editions of this collection, I would like to see included the Additional Protocol to the European Convention of Human Rights. The text of the Convention itself figures in the Collection. This Protocol, although small in size, is none the less very important, as it is only in virtue of this Protocol that the right to own property is protected under the Convention.

IGNAZ SEIDL-HOHENVELDERN

FRYE, W. R. *A United Nations Peace Force.* Prepared under the auspices of the Carnegie Endowment for International Peace. New York: Oceana Publications, 1957. Pp. xii, 227.

The author, as well as the sponsor of the present publication, the Carnegie Endowment for International Peace, must be congratulated for having succeeded in a very ambitious project: to publish a book on one of the rare activities of the UN, which did really strike popular imagination all over the world, and moreover to publish it so closely following upon the event that public interest in this question has not yet evaporated. Written in an easy style, interspersed with amusing human sidelights, published at a really low price ($1.—) it will do more to gain publicity for UN efforts than many a learned treatise. This is all the more valuable as the book deals with one of the few successful actions of the UN aiming to fulfill the originally intended main function of the UN—preserving world peace. It deals with the origin of the UN Emergency Force (UNEF) sent to Egypt after the Suez Crisis and the problems connected with any attempt to profit from what has to be considered the success of UNEF by establishing either a permanent United Nations Peace Force or by taking at least such steps as would ensure that a Force of such type could be activated at short notice in time of emergency. The author has profited from the advice of United States officers and diplomats, whose papers are published in an annex.

With remarkable insight, the author studies one by one the many problems which the setting up of such a Force would create as well as the usefulness, if any, of such Force in the various present-day trouble-spots. The author really seems to have treated every angle of these problems, be they of foreign policy or domestic policy of the Great Powers, legal or logistic. He does not venture to give clear-cut answers to all the questions he raises, and he gives good reason why it may be inadvisable to answer all these questions in advance. By implication, these questions tend to provoke people into thinking about the present limitations imposed on UN in its task to preserve world peace. It would be over-optimistic to hope that any real progress could be achieved by this book in clearing away such major obstacles as the veto power, etc. However, any effort to answer these questions will be a step towards the achievement of the more limited, but incomparably more realistic aim of the author, the setting up of a UN

Peace Force modelled on UNEF. The author does not hide the fact that the cost of setting up such a Force would be about $25,000,000 a year. It would appear therefore more realistic to aim at earmarking national contingents to be put at the disposal of UN should an emergency arise.

The formula does appear somewhat similar to the aims of the Uniting for Peace Resolution—however with the important difference that the main strength of such an UN Peace Force "would not lie in its rifles but in its UN armbands." A Force conceived on such lines could, of course, operate only with the consent of the host state. This would considerably reduce the scope of its possible activities, yet quite a few contingencies may be conceived, where such a Force would be extremely useful. Such Force would not so much risk incurring the opposition of the United States Department of Defense which, according to the author, virtually killed the more ambitious schemes based on the Uniting for Peace Resolution. It is a more discouraging sign, that the Soviet Union has called UNEF "illegal," yet the fact that UNEF did fulfill a useful job probably even if seen through Soviet eyes (unless we presume the Soviet Union was out to start World War III in November 1956) may make Soviet opposition less formidable than on other occasions.

It is to be hoped that the book will be circulated widely. It is an ideal choice for debating on these subjects with students. Its low price makes it easily accessible. It is true that this price was made possible only by a certain reduction of glamour in print, paper, and binding—but I wonder whether American publishers should not follow this precedent more often.

IGNAZ SEIDL-HOHENVELDERN

*Yearbook of the United Nations, 1956.* In co-operation with the United Nations. New York: Columbia University Press, 1957. Pp. x, 586.

The present volume of the Yearbook covers the events of the year 1956 and of the first months of 1957, when the political scene was dominated by the tragic events in Hungary and by the Anglo-French action on the Suez Canal. The Yearbook publishes the text of most of the pertinent resolutions of the General Assembly; it is moreover an invaluable guide through the maze of the relevant UN documents and UN publications. From the point of view of a student of comparative law the Yearbook offers little *direct* help, except by publishing the draft treaties on the status of married women, etc. However, here too, the main value of the Yearbook lies in the fact that it permits the tracing of the replies of the various countries to UN questionnaires concerning certain aspects mainly of their social legislation. These replies constitute valuable source material for any study of comparative law in these fields, which would otherwise remain practically inaccessible.

IGNAZ SEIDL-HOHENVELDERN

KABES, V.—SERGOT, A. *Blueprint of Deception.* The Hague: Mouton & Co., 1957. Pp. 365.

This book concerns the activities of the International Association of Democratic Lawyers. In a way, one would tend to consider it unnecessary to devote such a large volume to showing that this Association follows the Communist Party line—although it may not only be fear of the libel laws which compels me to add that not all of its members are necessarily members of the Communist Party. The record of this Association speaks for itself—wherever the Association took a stand, it echoed Communist ideas. However, the mere fact, that

not *all* of the Association's members are Communists shows the usefulness of the present compilation of the complete record of the Association. Although anybody who is but a little familiar with problems of international law and foreign politics will be able to recognize the Communist inspiration into whatever branch of the activities of the Association he may care to look (e.g., in the field of nationalizations[1])—there is just a faint chance that someone might be misled into thinking that it is only by accident that the Association's attitude conforms to the Communist Party line, and that this conformity with Communist views might be limited exclusively to the activity he is examining. The authors tear away the thin camouflage that may still be used by the Association, but personally I am under the impression that at present at least, the Association does not even care to conceal its source of inspiration. In the past this was not always the case. The present book contains an interesting case-study on the rise and the external and internal life of a Communist-led nongovernment international organization, which may be of interest even outside the scope of the activities of this organization.

IGNAZ SEIDL-HOHENVELDERN

[1] The Association has published two brochures on this subject in 1956 and 1957. I referred to the arguments contained therein in two articles "Bemerkungen zu kommunistischen Theorien über das internationale Konfiskations- und Enteignungsrecht," Internationales Recht u. Diplomatie (Hamburg) 1957, p. 327–341, and "Gedanken zur Studientagung über Nationalisationen," V Annales Universitatis Saraviensis (Saarbrücken) 1956/57, p. 206–221. For an elaboration of this topic in English, *cf.* this Journal, Vol. 7 (1958) at 541 *supra*.

RODEE, C. C., ANDERSON, T. J.—CHRISTOL, C. Q. *Introduction to Political Science*. New York: McGraw-Hill Book Company, 1957. Pp. xiii, 655.

PIERSON, W. W.—GIL, F. G. *Governments of Latin America*. New York: McGraw-Hill Book Company, 1957. Pp. vii, 514.

These two books complement each other admirably, providing, the one, a general introduction to the subject of political science, and the other, a closer look at a particular area. *Introduction to Political Science* is sweeping in scope and includes a definition of the subject, a statement of the characteristics of the state, an analysis of the various forms of government and their applications, an exposition of democracy, a consideration of political dynamics such as public opinion, political parties and propaganda, a survey of technology in contemporary society and an account of trends in governmental organization and administration, and a treatment in some detail of the subject of international relations with its many ramifications like foreign policy, power politics, and international law and organization. A special chapter on law is included; that it is approached as international, roman, civil, common, and soviet is demonstrative of the non-parochial nature of the volume. Democracy is the preferred value; following a description of some of its institutions, its role in the United States, Great Britain, France, Italy, Western Germany, and Switzerland is assayed. Communism, in theory, and in practice in the Soviet Union; Fascism and Nazism, in theory, and in practice in Italy and Germany; and other contemporary political theories, such as anarchism, syndicalism, guild socialism, and pluralism, among others, are also evaluated. The conclusion deplores the lethargy of the American body politic and offers ten commandments for responsible citizenship, of no little merit.

*Governments of Latin America* deals with twenty Latin-American republics; because books like the previous one rarely explore these coun-

tries in any detail, its value is at once evident. The approach here is topical and comparative, rather than country-by-country. A geographical foundation is first laid, with some of the facts of the peoples, land, and resources considered. Then follows a series of chapters dealing with the colonial institutions of Spain and Portugal and the struggles for independence that gave rise to national diversity and the quest, not always successful, for identity and stability. The major portion of the remainder of the book is concerned with governmental and constitutional developments and provisions on a formal level, although with a record of 202 different constitutions between 1811 and 1953 among the twenty republics considered, some of the fictions have necessarily been discarded for the sake of brevity and reality. Chapters dealing with individual rights, the executive, the legislature, the administration of justice, local government, parties and elections, labor, education, and the economy set forth something of the basic tenets of the bodies of fundamental law, together with enlightening interpretative comment that plausibly accounts for the disparity between achievement and professions. Latin America's relations with the rest of the world and the United States are treated in the final two chapters, by which time an appreciation of some of this area's special problems and heritage will have been had. Reflecting in large measure an indisputably valid Latin-American point of view, and incorporating a valuable bibliography of primary sources and a glossary of terms that throughout the book contribute to its authenticity, this enriches further the literature of political science and Latin America.

HILLIARD A. GARDINER

BICKEL, A. M. *The Unpublished Opinions of Mr. Justice Brandeis.* Cambridge: The Belknap Press of Harvard University Press, 1957. Pp. xxi, 278.

In this collection of eleven opinions and accompanying commentary, the personal attributes of Mr. Justice Brandeis made most manifest are his dedication to thoroughness and precision, as demonstrated in his opinion in *Shafer v. Farmers Grain Company,* where he analyzed the grain industry in indescribable detail in support of his reluctance to restrict state regulatory power; his hostility to giantism, as shown in his view in *Stratton v. St. Louis Southwestern Railway,* where he termed a tax for the privilege of doing business a mere measure of the price of the favor, and not, as held by the Court, an unconstitutional interference with commerce; his preoccupation with procedural niceties, as evinced in *St. Louis, Iron Mountain and Southern Railway v. Starbird,* where he opined that the parties, because of a failure to assert federal law in the state court, had waived a right to appeal to the Supreme Court; his liberal outlook and identification with the "people," displayed in the *Arizona Employers' Liability Cases* opinion that upheld the constitutionality of a statute that created employer liability without fault and permitted a choice of remedy by the employee; and his belief in judicial self-restraint, exhibited in such cases as *Atherton Mills v. Johnston, Sonneborn Bros. v. Cureton,* and *Railroad Commission v. Southern Pacific Railway,* in each of which he declined to countermand the legislative will. Brandeis' awareness in the realm of policy is similarly inferable from his opinion in the famous antitrust decision involving a union, *United Mine Workers v. Coronado.*

This book penetrates to a singular extent the inner life of the Supreme Court during an age of conservatism. A biographical appendix of the justices who sat with Brandeis is an additional interesting feature.

HILLIARD A. GARDINER

BALL, M. M.—KILLOUGH, H. B. *International Relations*. New York: The Ronald Press Company, 1956. Pp. viii, 667.

HAINES, C. G. (Ed.) *The Threat of Soviet Imperialism*. Baltimore: The Johns Hopkins Press, 1954. Pp. xvi, 402.

*International Relations* is authored by an economist and a political scientist and adopts an interdisciplinary approach, the success of which becomes increasingly evident as the volume is utilized. Apart from the introduction, which defines the text's purpose as that of describing international problems and the attempts to solve them, there are five parts, each of which significantly contributes to an understanding of international affairs. Part I describes the international community: its origins and development, the meaning and implications of nationalism, and the existing system of international law, as well as the economic interdependence of the states that comprise the modern international community, and the power structure that is an inescapable aspect of it. Part II deals with national policy: the formulation of foreign policy; the agencies that administer it; the devices used to effectuate it, such as negotiation, mediation, arbitration, conciliation, judicial settlement, and war; and the territorial and economic problems that are the unavoidable aftermaths of war. In Part III, international organization is analyzed, in terms of its framework, as exemplified by the League of Nations and the United Nations; from the point of view of minorities and human rights; in connection with the dependent areas and the mandate and trusteeship arrangements; and from the point of view of co-operation on economic, social and cultural planes, such as that envisaged by the many component organs of the United Nations as well as the several outside agencies devoted to like ends. Part IV of the text, "The Search for Collective Security," provides an historical account of international developments since the first World War, ending in a study of regionalism and the many forms it has assumed, especially since World War II. The fifth and final part, entitled "Schism," is concerned with tension areas between East and West, such as Central Europe, Trieste, The Near and Middle East, East Asia, and South and Southeast Asia; United States policy; Russian Policy; The Role of Britain and France; and proposed solutions to the problem of nation-state, division, and disunity, such as federation, Atlantic Union, and alliance. In addition to a worthwhile bibliographical section, an appendix contains copies of the Covenant of the League of Nations, the Charter of the United Nations, the Inter-American Treaty of Reciprocal Assistance (The Rio Treaty), and the North Atlantic Treaty.

*The Threat of Soviet Imperialism* comprises twenty chapters corresponding to twenty papers read at an August, 1953, conference in Washington sponsored by the School of Advanced International Studies and dealing with the problem of Soviet imperialism. The historical background is first examined and then its meaning for the present and future policy of the United States considered. Part I generally concerns itself with the broad aspects of the relationship between the Soviet Union and the non-Soviet world and undertakes to assess the historical and doctrinal factors involved in determining the motivations and estimating the objectives of the Soviet Union. Part II analyzes some of the principal weapons of subversion and attack employed by the Soviets to attain their objectives, particularly trade, propaganda, diplomacy, and the use of force. In the third part, the capabilities of the Soviet Union to attack are contemplated: the economic resources and potentialities of the Soviet bloc; the present status and future possibilities of Soviet science;

the number and extent of reliability of devotees represented in the world Communist movement; and the military power which the Soviets can throw into the balance now and in the foreseeable future. The fourth and fifth sections present selected case studies of Soviet expansionist activities, giving particular attention to local circumstances in western and eastern Europe, Africa, Latin America, the Middle East, India, Southeast Asia, and China, which encourage or retard these activities. In the concluding paper, the response of United States foreign policy to the worldwide challenge of Soviet imperialism is discussed.

The two books supplement each other interestingly. The first is in the nature of a text and reference work, one which provides reliable background material with which to evaluate and approach the crises of the present. The *Threat of Soviet Imperialism,* on the other hand, is a compendium of commentaries by various acknowledged experts, including George Kennan, Frederick Barghoorn, Harry Schwartz, William C. Johnstone, and Paul Nitze. At the end of each paper is to be found a statement by another expert, who, in the role of discussion leader, reviews the findings of the principal *rapporteur* and places them in the perspective that the whole text seeks to create. Is there any uniformity of viewpoint that would warrant assertion to the effect that a central thesis is proffered? While there is honest disagreement in judgment and diversity of expectation among the many contributors, the consensus is that the Soviet Union proceeds unswervingly toward the goal of world communism, with all that this may imply for the free world, as in considering the policies of the Soviet Union and other nations, the authors of *International Relations* also conclude.

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# Bulletin

*Special Editor:* KURT H. NADELMANN

American Foreign Law Association

## REPORTS

CHICAGO INTERNATIONAL CONFERENCE ON CONTROL OF RESTRICTIVE BUSINESS PRACTICES—The School of Business of the University of Chicago sponsored a four-day international conference on the above subject which was held at Chicago from January 13 to 16, 1958. Government officials from all over the world and 35 United States experts on antitrust law were invited. It is believed that this was the first international conference of its kind which, under the sponsorship of a private institution, brought together officials from numerous foreign countries for the purpose of exchanging views among themselves as well as with those interested and experienced in the administration and teaching of antitrust law in the United States. Delegates were sent from Austria, Belgium, Canada, Denmark, France, the Federal Republic of Germany, Greece, Ireland, Italy, Japan, Netherlands, New Zealand, Norway, Sweden, and the United Kingdom. Most countries were represented by several delegates, including in the majority of cases the highest government official in charge of the country's restrictive business practices legislation. In addition, the European Productivity Agency was represented, as were our own State Department, Department of Justice, and Federal Trade Commission. The discussions centered around problems concerning concentration of business, monopoly and mergers, as well as the effect of the common market on restrictive practices within the countries concerned and on their export trade. There was much discussion of problems of the extraterritorial effect of United States antitrust legislation, as well as an interchange of views concerning the economic effects and legal validity of certain cartel agreements, territorial divisions, price fixing contracts, etc., in those European countries which had recently enacted legislation in this area. Formal papers which, it is hoped, will soon be published by the University of Chicago, included addresses by the recently appointed British Registrar, in charge of registration under the Restrictive Practices Act of 1956, Rupert Leigh Sich; by Dr. Eberhard Günther, the newly appointed president of the German Cartel Authority; by Wilhelm L. Thagaard, Director of the Norwegian Price Control Directorate; by P. Verloren van Themaat, Director of the Office of Industrial Organization Problems, Ministry of Economic Affairs, of The Netherlands, and others.

The conference was arranged and generally presided over by Professor Corwin D. Edwards of the School of Business, University of Chicago, in conjunction with an Executive Committee. It is hoped that much of the material prepared for and discussed during the conferences will be made available to all those interested in comparative law since it will constitute a veritable treasure of up-to-date information on restrictive trade practices legislation all over the world.

WALTER J. DERENBERG

CONFERENCE ON LEGAL ASPECTS OF TRADE BETWEEN PLANNED AND FREE ECONOMIES—A Conference on Legal Aspects of Trade between Planned and Free Economies was held in Rome from February 24 to March 1, 1958, sponsored by the International Association of Legal Science under the auspices

of UNESCO. There were 17 participants, coming from Belgium, Bulgaria, Czechoslovakia, England, France, Italy, Poland, Sweden, U.S.A., U.S.S.R., and Yugoslavia.

Working papers had been circulated on the following subjects—which constituted, also, the agenda of the discussions: 1. The significance of the most-favored-nation clause in trade agreements between planned and free economies, and alternative formulations of commitments to conduct trade on the basis of commercial considerations only; 2. Provisions in trade agreements between planned and free economies relating to unilateral, bilateral or multilateral programs of deliveries of goods; 3. Effects of exchange controls upon trade agreements between planned and free economies, including possible techniques for multilateralization of payments; 4. The doctrine of sovereign immunity in court cases involving disputes between representatives or organizations of planned economies and private traders or government agencies of free economies; 5. Arbitration of commercial disputes between representatives or organizations of planned economies and private traders or government agencies of free economies. It is hoped that ultimately there may emerge a book, containing the working papers and an account of the proceedings, edited by the undersigned, who was the General Reporter.

It might be useful to state briefly certain general results of the conference: First, the participants learned a good deal—they got new facts and also new ideas and insight; at least so they testified. This was due primarily to the high quality of some of the reports and to the relative freedom and informality of the discussions. The number of participants was small enough to make direct interchange possible and to create a feeling of common intellectual endeavor. Also, the setting of definite issues and the joining of issue from the point of view of planned and free economies respectively helped to avoid merely descriptive presentations. Second, it appeared that purists from communist and noncommunist countries can discuss certain questions together as members of a learned society which it would be very difficult for them to discuss if they were representing their governments; that they can disagree with their governments' policies within limits; in short, that the community of scholars transcends even the widest political boundaries. Third, substantial agreement was reached on many points. There was agreement, indeed, on the main point—that what the economists call techniques, what lawyers might call the legal and institutional framework or structure, of trade between planned and free economies can be improved to the mutual advantage of both kinds of economy.

HAROLD J. BERMAN

UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION—From May 20 to June 10, 1958, a Conference was held at the United Nations in New York to consider a draft of a Convention on the Recognition and Enforcement of Foreign Arbitral Awards which had been prepared by an Ad Hoc Expert Committee of the Economic and Social Council in 1955. Forty-five states (among them a five-man delegation of the United States) participated in the Conference, as well as nongovernmental organizations. In the latter category were the International Law Association and the International Association of Legal Science. The Conference was primarily concerned with substantive questions, in particular the scope of the Convention and the definition of "foreign awards," a provision for the recognition of the validity of agreements to settle future controversies by arbitration, and the so-called "double-exequatur," namely the dual judicial control of the award by courts of the country of the arbitration and by those of the country where enforcement is being sought. The new Convention, which constitutes an im-

provement over the 1927 Geneva Convention, permits a successful party to obtain satisfaction of the award regardless of the place of arbitration, the nationality of the arbitrators and, generally, the domestic arbitration statute prevailing at the place of the arbitration. Thus, the autonomy of the will of the parties plays a decisive role when they conform to proper arbitration procedures.

The United Nations further adopted a resolution on "other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes," calling for "wider diffusion of information on arbitration laws and practices . . . establishment of new and improvement of existing arbitration facilities . . . technical assistance in the development of effective arbitral legislation and institutions . . . [and] attention to be given to defining suitable subject matter for model arbitration statutes."

The Final Act, signed by 40 nations, contained details of the work carried out by the Conference and its Committees, as well as the text of the Convention which was signed by representatives of 10 nations and which will be open for signature until December 31, 1958.

MARTIN DOMKE

SECOND INTERNATIONAL CONGRESS ON SOCIAL LAW—During the six months of the Brussels World's Fair there was a constant succession of conferences going on in the city. One was an international conference, June 8 to 14, 1958, on what in America would be called Labor Law and Social Legislation. The list of registrants shows some 260 persons in attendance from perhaps 20 nations. While the largest number by far were from Belgium, there was substantial representation from England, Argentina, France, Germany, Brazil, and Italy. Delegates attended from Yugoslavia, Poland, Hungary, and Czechoslovakia, and there were also representatives of the International Labour Organization and various Belgian governmental bureaus. Unfortunately, there were but three persons from the United States: Mrs. Barbara Armstrong, University of California at Berkeley, Harold A. Katz, of Katz & Friedman, Chicago, and Robert E. Mathews, of Ohio State University, who had also been designated representative of the Association of American Law Schools.

The Congress enjoyed wide sponsorship. It was organized by the Belgian Inter-University Institute for Social Law, under the auspices of the International Society for Social Law of São Paulo, Brazil. The over-all Chairman was the eminent Professor Fernand Van Goethem, of the Law School of the University of Louvain.

The substance of the program was divided among six topics. Each was in charge of a Reporter General. Perhaps a hundred or more national reports had been submitted. For brevity's sake the topics, names of the Reporter General and authors of our own national reports are listed as follows: 1. The Individual Contract of Employment. Reporter General: H. C. Nipperdey, Germany. American Reporter: Charles A. Reynard, Louisiana State University. 2. Collective Labor Contracts. Reporter General: Otto Kahn-Freund, England; American Reporter: Alfred W. Blumwosen, Rutgers University. 3. Social Security Law. Reporter General: M. G. Levenbach, The Netherlands. American Reporter: Barbara N. Armstrong. 4. The State and Industrial Accidents. Reporter General: Paul Horion, Belgium. American Reporter: Harold A. Katz. 5. Labor Relations in Non-Autonomous Territories. Reporter General: Count Pierre de Briey, I.L.O. 6. Social Legislation under Federal and Supra-National Systems. Reporter General: Mario de la Cueva, Mexico. American Reporter: Thomas I. Emerson, Yale University.

After an opening session at the University of Brussels, the professional discussions were rotated among the Law

Schools of Ghent, Louvain, Liège, and Brussels. They were interspersed by receptions, a special concert dedicated to the Congress, a sightseeing trip to Antwerp and Bruges, plus ample opportunities to visit the impressive Exposition. The program concluded with summarizing speeches and an official luncheon. Each "work session" was devoted to the Reporter General's presentation plus extended discussion. The proceedings were transcribed and are to be made generally available in both French and English translations.

ROBERT E. MATHEWS

SEVENTH CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION—The Seventh Conference of the International Bar Association was held in Cologne, Germany, July 21-25, 1958, at the invitation of the *Deutscher Anwaltverein* and the *Kölner Anwaltverein*. Member organizations comprising the national bar associations of a large part of the world sent delegations to the conference. Thirty-six countries were represented by 520 members of the legal profession, accompanied by 191 guests. At the opening session held in the magnificent Gürzenich, conferees were welcomed to Germany by Federal Minister of Justice, Fritz Schäffer. The same evening the Mayor of Cologne extended the city's greetings at a reception at the Wallraf-Richartz-Museum. Officers and retiring Councillors were invited to Bonn to meet Chancellor Adenauer. There the Chancellor recounted his early years as a practicing lawyer in Cologne and expressed his firm faith in the rule of law as the only possible basis for civilization and peace. Official delegates from thirty-three member organizations attended the general meeting. The meeting approved the proposed constitutional amendments, to provide for one member of the Council from each member organization, and to permit the variation from country to country of the Patron's or Subscriber's contribution to the Association. It also approved in principle the report of the joint commission of the IBA and the *Union Internationale des Avocats* and authorized the IBA representatives to continue the study of a possible fusion of the two organizations. The report of the Legal Aid committee was referred to the Council of the IBA to implement the establishment of an International Legal Aid Association under the auspices of the IBA. The following officers were re-elected: Loyd Wright (USA), chairman; Gerald J. McMahon (USA), secretary general, Sir Thomas Lund (England), treasurer.

The following topics were discussed in plenary sessions and symposia: International Problems of Tort Liability and Financial Protection arising out of Atomic Operations (chairman: Emil von Sauer (Germany), rapporteur: E. Blythe Stason (USA)); The American Close Corporation and its Equivalent, and the Status of Wholly-Owned Subsidiaries in Other Countries (chairman: Loyd Wright (USA), rapporteur: Philippe Gastambide (France)); Monopolies and Restrictive Trade Practices (chairman: Sven Arntzen (Norway), rapporteur: R. O. Wilberforce (England)). Open committee meetings were held to consider the following topics: Various Plans for Providing Retirement Income for Members of the Legal Profession; Insurance Protection against any and all Types of Lawsuits; International Shipbuilding Contracts; International Judicial Co-operation; Administration of Foreign Estates; Protection of Investments Abroad in Time of Peace; Qualification to Practice Law in the Foreign and International Field; Legal Aid. The use of simultaneous translating equipment for meetings held in the Great Hall of the Gürzenich contributed to the interest and accomplishment of those sessions. Thirty-two papers and reports on the three topics considered in Plenary sessions and symposia were presented by leading members of the legal profession appointed by their respective bar associations. In addition, the respective

chairmen prepared one combined report for each of the committee topics, assembled from information supplied to them by the members of their committees.

GERALD J. MCMAHON

AMERICAN BAR ASSOCIATION SECTION ON INTERNATIONAL AND COMPARATIVE LAW —The Annual Meeting of the Section of International and Comparative Law which was held in Los Angeles on Tuesday, August 26, 1958, provided the occasion for several addresses of interest to comparative lawyers. The first was an address delivered by Mr. Eugene D. Bennett of San Francisco at the Breakfast Meeting held under the joint sponsorship of the Section and the American Foreign Law Association. Mr. Bennett delivered a most valuable and interesting talk on "A Comparison of Foreign and United States Anti-Trust Legislation." Since Mr. Bennett's talk was exceptionally well received, he was asked to prepare his remarks for publication in a forthcoming issue of the Bulletin of the Section of International and Comparative Law. The afternoon session was devoted to the "Scientific and Legal Problems of Space Travel." Under the chairmanship of Mr. David F. Maxwell, the immediate past President of the American Bar Association, a panel discussion was conducted under the joint sponsorship of the Section of International and Comparative Law, the Section of Real Property, the Section of Probate and Trust Law, and the Standing Committee on Aeronautical Law. The speakers dealt with various aspects of space travel ranging from the human factors to questions of national sovereignty in space and the position of the United States in the control of space. Pursuant to the report of the Nominating Committee, all of the present officers of the Section were retained in office with one exception. Edward D. Re, formerly a member of the Council, replaced John N. Hazard as Divisional Vice Chairman of the Comparative Law Division. The vacancy on the Council was filled by the election of Arthur E. Sutherland, Jr. of the Harvard Law School. The officers and members of the Council of the Section are therefore presently as follows: *Officers:* Chairman: Homer G. Angelo; Vice-Chairman: J. Wesley McWilliams; Divisional Vice-Chairmen, International Law Division: Harry LeRoy Jones, Comparative Law Division: Edward D. Re, International Organizations: Eugene D. Bennett; Secretary: Harry A. Inman. *Council:* Victor C. Folsom, Wilder Lucas, Arthur E. Sutherland, Wayne D. Williams, Sam G. Baggett, Jacob M. Lashly, Herman Phleger, Max Chopnik, Helen L. Clagett, James O. Murdock, Loftus Becker, Herbert Little, John R. Stevenson; Section Delegate to the House of Delegates: Lyman M. Tondel.

EDWARD D. RE

FIFTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW—Under the auspices of the International Academy of Comparative Law, the Fifth International Congress of Comparative Law was held in Brussels, August 4–9, 1958, at the Palais de Justice. The conference was well attended. Some 350 conferees registered, about one third from the host country. About 40 participants came from the United States, one out of 38 countries represented. On the 44 topics on the agenda, more than 400 national reports had been prepared, and there were 42 general reports. A number of national committees had brought out their reports in volumes printed for the occasion.

The conference formally opened in the splendid hall of the Court of Cassation. Among the distinguished speakers was Professor Hessel E. Yntema (USA), president of the conference. Tribute was paid to the memory of members of the Academy who had died and, in particular, to the memory of Elemér Balogh, originator of the conferences and first secretary general of the Academy. The business sessions took place in court rooms in the Palais.

The local organization was in the hands of a Belgian Organizing Committee headed by Baron L. Frédéricq, of which Professor J. Limpens was secretary general. The excellent work of the Organizing Committee was the subject of general praise and was duly recognized at the closing session. Social events, receptions by the Court of Cassation, the Minister of Justice, the Mayor, at the famous City Hall, visits to Ghent and Brugge, as well as to the World Fair, contributed to the pleasantness of the conference.

A number of resolutions were adopted at the working sessions and will be published in due course. The conference's scholarly success will be found primarily in the papers prepared for the meeting. The planning of the meeting was deficient in many respects. Too many topics had been chosen for only three working days. Three, often four, groups met at the same time in each of the four main sections. Attendance thus was necessarily haphazard. Resolutions passed by small groups have little weight. More important even, national reports or representation from important countries often were lacking. General reporters are not appointed sufficiently in advance and thus cannot see to it that they get indispensable material for a proper discussion of the assigned topic. In a number of instances the general reporters were not present. Some designated chairmen did not have the linguistic facilities required for chairing such meetings. These defects have been noted at the earlier conferences sponsored by the Academy and have long been criticized. Of course, many difficulties are inherent in such international meetings; however, errors of the past which can be remedied should not be perpetuated. May we suggest that the Academy and its new secretary general undertake a comparative study of conference techniques?

KURT H. NADELMANN

INTERNATIONAL UNIVERSITY OF COMPARATIVE SCIENCES; FIRST SESSION OF INTERNATIONAL FACULTY OF COMPARATIVE LAW, AT LUXEMBURG. AUGUST 11–SEPTEMBER 24, 1958—On August 11, 1958, the new International University of Comparative Sciences was inaugurated in the Salle des fêtes de l'École Européenne in Luxemburg; a distinguished audience which included the Grand Duchess and the Prince Consort, was addressed by the President of the Government, Pierre Frieden, the rector of the University, P. Andrieu Guitrancourt, and the dean of the International Faculty of Comparative Law, F. de Sola Cañizares, as well as by H. E. Yntema, L. Julliot de la Morandière, H. Ficker, and I. Baugniet, from the United States, France, Germany, and Belgium, respectively. Enlivened by various social events generously provided by the Luxemburg authorities following the inauguration, the first session of the International Faculty of Comparative Law commenced on August 12, lasting to September 24, 1958. Lectures were given on (1) General Introduction to Comparative Law, (2) History and Philosophy, (3) Principal Systems of Contemporary Law, (4) Corporations, and (5) Supranational European Organizations, by visiting professors from a large number of the principal universities in Europe, Latin America, and the United States. Those from the United States included Messrs. J. P. Charmatz, A. F. Conard, B. H. Greene, J. N. Hazard, L. Loss, M. Rheinstein, A. T. von Mehren, and H. E. Yntema. In addition, A. A. Ehrenzweig, K. H. Nadelmann, L. Oppenheim, M. C. Smith, D. S. Stern, F. F. Stone, and H. P. de Vries of the United States participated in the inauguration program. 131 students from 34 countries attended. During the session, the International Faculty of Comparative Law was organized, and a revised and more systematic course of instruction covering three years was considered and adopted. On August 11, a meeting of specialists on Family Law was held by Professor Rheinstein; on the following day there was a conference of directors of comparative law institutes convoked by Professor Rotondi of Italy.

In addition to the Faculty of Law, Faculties of Economics and History are being formed, all offering programs of a comparative nature for postgraduate students in the respective disciplines. There are to be two six-week sessions each year in August–September and March–April; the next session is to commence March 16, 1959.

H. E. YNTEMA

FIFTH INTERNATIONAL CONGRESS OF SOCIAL DEFENSE—The International Society of Social Defense held its fifth congress August 25–30, 1958, in Stockholm. The general topic selected for discussion was "Intervention, by the Courts or by other Authorities, in the case of Maladjusted Children and Adolescents." It had been divided into three segments: Stages in the Development of Socially Maladjusted Minors; The Competent Authorities; Available Measures. Extensive reports had been prepared in advance by the National Center of Prevention and Social Defense of Milan, the Inter-American Institute of Social Defense, Caracas, the Study Center of Social Defense in Comparative Law, University of Paris, and the Department of Criminal Science, University of Cambridge. Fifty-five reports from individuals were also available, among them five from the United States.

Each of the three questions was introduced by two general rapporteurs whose reports had been printed. The general rapporteurs for the first question were Dr. Jean Dublineau, psychiatrist attached to the mental hospitals of Paris, and Mr. Maurice Veillard, judge of the juvenile court of the canton of Vaud, Switzerland; for the second question, Mr. Ernst Bexelius, general director of the State Social Welfare Board, Sweden, and Professor Paul W. Tappan of the New York University; and for the third question, Mr. A. Ll. Armitage, president of Queen's College, University of Cambridge, and Supreme Court Justice, Stanislaw Plawski, Poland. The program was so arranged that each question was debated by the entire assembly in the order of its presentation, instead of in separate sections meeting concurrently. Simultaneous interpretation was available in English, French, and Italian, the auditorium of the School of Technology, where the sessions were held, being equipped with the necessary individual earphones. A curious fact was that no participants spoke in the language of the host country.

The congress was attended by about 200 persons from 37 countries. Not counting the Swedish participants, those from Italy, France, and Belgium were especially numerous. The USSR, Hungary, Poland, and Czechoslovakia were represented, as were Japan, the Republic of Indonesia, and South Vietnam. Eight of the congress members came from the United States.

The planning of the congress and the local arrangements had been made by Professor Ivar Strahl of the University of Uppsala. Receptions were tendered by the Swedish Association of Criminalists and the city of Stockholm. A memorable evening was the performance of Scarlatti's opera "Il Trionfo dell'onore" at the 18th century theater at the castle of Drottningholm to which all the congress members had been invited. One day was reserved for visits to nearby correctional institutions.

THORSTEN SELLIN

INTERNATIONAL LAWYERS CONVENTION IN ISRAEL—On August 17–20, 1958, an International Lawyers Convention was held in Israel under the sponsorship of the Israeli Government, the Israeli Bar Association, the Hebrew University Faculty of Law, and the Tel Aviv Law School. The principal purpose of the meeting was to give lawyers from abroad an opportunity to learn about legal development in the State of Israel during the past decade.

Convention sessions were held in the Wise Auditorium on the new campus of the Hebrew University in Jerusalem. The participants included more than one hundred lawyers from 12 different

countries. Among the guests of honor were Monsieur René Cassin, Vice President of the French Conseil d'État, Justice H. E. Louis Boffi-Boggero of the Supreme Court of Argentina, Lord Denning, English Lord of Appeal in Ordinary, Mr. Justice Devlin of the Court of Appeal of England, Sir William Fitzgerald, the last Chief Justice of Palestine under the British Mandate, and Professor David F. Cavers, Associate Dean of the Harvard Law School.

The principal speech of welcome at the opening session was given by Mr. Pinhas Rosen, the Minister of Justice of Israel, and Monsieur Cassin responded on behalf of the guests from abroad. Mr. Haim H. Cohn, Attorney General of Israel delivered the major address of the evening on "The Spirit of Israeli Law."

A very complete program was crammed into the following three days. Lectures on various legal problems encountered by the new State were delivered by prominent members of the Israeli Bar including: Justices Z. Berenson and A. Vitkon of the Israeli Supreme Court; Israeli District Court Judges H. E. Baker and I. Kister; and Professor Benjamin Akzin, Dean of the Hebrew University Faculty of Law. The lectures dealt with the reception and development of common law and equity in Israel; problems of constitutional and administrative law; social and labor legislation; the law of personal status, particularly affecting foreign nationals; and the law of taxation, currency, and foreign investments. Each lecture was followed by a discussion in which both foreign and local guests participated.

In addition to the lectures by Israeli lawyers, addresses were delivered by Lord Denning on the topic "Responsibility before the Law"; by Dean Cavers on "Legal Education in the Atomic Age"; by Dean Zelman Cowen of the Faculty of Law of the University of Melbourne on "The Constitution of Malaya"; and by Sir William Fitzgerald on "A Review of the Development of Law in Israel."

At the final session, the Convention unanimously adopted a resolution recommending that the opinions of the Israeli Supreme Court be translated into English to make it possible for the rest of the legal world to keep abreast of new developments in the young State. Lawyers from Commonwealth countries, particularly, noted that British courts might gain valuable insights from the opinions of a Court which, though influenced by British legal tradition, was not bound by British precedents.

The guests were also regaled by a series of lavish social functions. A banquet was held in the King David Hotel in Jerusalem, and separate receptions were given by the President of Israel and the mayors of Jerusalem, Tel Aviv, and Haifa.

NORMAN ABRAMS

FORTY-EIGHTH CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION—The Forty-Eighth Conference of the International Law Association was held in New York at the New York University Law Center from September 1 to September 7, 1958. This was the fourth time that the United States was host to the biennial conferences of the Association since its creation in 1873. The conditions prevailing at the time of this Conference were markedly different from those prevailing in the days when Americans such as David Dudley Field militated for an association where lawyers of different nationalities could exchange ideas. The idealism which inspired those men has been considerably tempered by scepticism born out of the cold war and the struggle between East and West. Few, if any, of those attending the Conference were under the illusion that their legal discussions would miraculously resolve the great problems of the world. But all were obviously determined that their views, even when they stemmed from different or antagonistic national policies, should remain soberly controlled and not be permitted to degenerate into political diatribes.

The spirit of self-restraint which manifestedly characterized the Conference was reflected to a degree in the results of its working sessions. Some of the topics considered were particularly difficult to handle in a gathering of more than four hundred members representing twenty-eight countries, including Czechoslovakia, Yugoslavia, Poland, and the Soviet Union. It was not to be expected that all the committees would end their discussions in full agreement or with entirely positive results. It is indeed satisfactory enough that substantial progress was made in most of the topics of a program which included legal aspects of nuclear energy, legal problems of international rivers, the enforcement of foreign judgments, the problem of nationalization and foreign investments, international monetary law, air law, the problems of co-existence, international company law, and the problems of the Charter of the United Nations.

It was in keeping with the realistic and professional tone of the Conference that its opening session should have been the occasion for an important statement by the Attorney General of the United States, Mr. William P. Rogers, concerning the reservations of the United States to the jurisdiction of the International Court of Justice. He pointed out that reserving matters within the "domestic jurisdiction" of the United States was one thing, but that reserving to the United States in addition the right to determine what is a matter of domestic jurisdiction, could have the effect of depriving its submission to the jurisdiction of the Court of real significance. The Attorney General pleaded for a re-examination of the domestic jurisdiction reservation and for support of a wider jurisdiction of the Court. The Attorney General then read to the Conference a message of welcome from the President. Robert P. Wagner, Mayor of the City of New York, also addressed the assembly. Mr. Oscar R. Houston, President of the American Branch, was elected President of the International Association at the opening session. Professor Joseph M. Sweeney of New York University was Hon. Secretary General of the Conference.

The banquet at the Waldorf Astoria which ended the meetings of the Conference witnessed a reaffirmation by distinguished speakers of their faith in the basic purpose of the Association. Mr. John J. McCloy, former United States High Commissioner for Germany and now Chairman of the Chase Manhattan Bank of New York, presided in his capacity as Chairman of the planning committee for the Conference. Judge John E. Read of Canada, a former member of the International Court of Justice, was the main speaker and emphasized the fact that the membership of the Association, being balanced as it were between practitioners, judges, and professors, was particularly well fitted to carry out the objectives of the Association. Other speakers at the banquet included Professor Arthur Goodhart, Chairman of the Executive Council of the Association and Master of University College, Oxford, Maître Henry Cocheaux of Belgium, and Mr. Whitney North Seymour of the New York Bar.

There seems to be no doubt from all accounts that as a manifestation of American hospitality, the Conference was a success. Many of the members stayed in the Hayden Residence Hall of the New York University Law Center. Luncheons were given by the New York University Law Center, the Law School of Columbia University, and by the American Foreign Law Association jointly with the American Society of International Law. The Association of the Bar of the City of New York and the American Arbitration Association gave receptions. All the members were offered an opportunity to be entertained privately in American homes, and a large number of members availed themselves of the invitation. The social events organized by the American Branch were effectively completed by

receptions given by the Canadian Branch and by the United Nations. Both the social and the business sides of the organization of the Conference were the more appreciated by the visitors when they came to realize that the expenses of the meeting were supported entirely from financial contributions by the members of the American Branch, law firms, and corporations and other private institutions.

JOSEPH M. SWEENEY

COLLOQUIUM ON THE CONCEPT OF LEGALITY IN SOCIALIST COUNTRIES—More than one hundred lawyers from twenty-one countries met in Warsaw on September 10–16, 1958, to participate in the second major colloquium on "The Rule of Law" of the International Association of Legal Science. The subject of the Warsaw meeting, *"Le concept de la légalité dans les pays socialistes,"* was chosen as the closest meaningful parallel to the Association's previous colloquium, held in Chicago in September, 1957, on "The Rule of Law as Understood in the West." (This Journal, Vol. VI, p. 518.) Eight *séances de travail,* four of them, morning sessions commencing at 10 o'clock and four afternoon sessions commencing at 4, were scheduled at the Palais Staszic in Warsaw over the seven-day period of the conference, and the unfailing hospitality of the colloquium's Polish hosts included receptions, the Warsaw opera, and a motorbus excursion into the Polish countryside on Sunday, September 15.

All of the Communist countries of eastern Europe, including Yugoslavia, were represented at the colloquium. As would be expected of the host country, the Polish delegation was by far the largest, accounting for about fifty of the colloquium's one hundred and twelve participants. Surprisingly, there were no representatives from Communist China or from any of the other Communist states of Asia, and the list of observers included no one from India or even from the Arab states. On the other hand, the confrontation of jurists from the Communist and non-Communist systems was on a far larger scale in Warsaw than had been the case at Chicago—some twenty-five Western European and American observers at Warsaw as against only three representatives of the Communist countries in Chicago—and the exchange of "Eastern" and "Western" views on the nature and tasks of law was quite spirited at two or three of the eight formal *séances de travail* and even livelier and more instructive at unscheduled conversations among individual colloquium participants.

Elaborate documentary preparations were made for the Warsaw meeting. Specially written papers, describing the theory and practice of "legality" in each of the European countries within the Soviet orbit, were distributed either before or at the colloquium. Despite a distinct unevenness of quality, the papers, taken together, constitute a unique source of information concerning contemporary juridical institutions and legal theory on the other side of the Iron Curtain. Professor V. M. Chkhikvadze's extensive monograph, "Socialist Legality in the U.S.S.R.," was clearly the most valuable of the Warsaw papers from an informational standpoint. Jurisprudentially, the most interesting papers, to Western readers at least, were those from Yugoslavia and Poland, which were strikingly more original and imaginative than the more dutifully Marxian papers from such countries as East Germany.

As for the *séances de travail,* the colloquium membership was far too large to permit anything resembling the give-and-take of round table discussions. Three of the eight sessions were given entirely to lengthy set speeches, and no opportunity was afforded at any session for impromptu questions and comments. The privilege of the floor had to be requested long in advance—perhaps a day or more—and the interventions, when they came, tended to be both too long and quite unrelated to what had preceded them. In spite of

this over-scheduling of speakers, there were occasional sparks of idea against idea, as when Professor P. S. Romachkin of the U.S.S.R. Academy of Sciences replied at length, during the fifth and sixth *séances,* to a series of critical questions raised by Western participants at the two preceding sessions.

The only effort to arrive at a structure of discussion—as distinguished from an order of speakers—was made by the colloquium's resourceful Rapporteur Général, Professor Stefan Rosmaryn. At the start of the fourth *séance,* Professor Rosmaryn announced a proposal of the colloquium's steering committee that the remaining sessions be given, in order, to the following areas of discussion: (1) The dictatorship of the proletariat and the concept of democracy; (2) Is the will of the people real and ascertainable? (3) What internal and external controls assure legality in the administration of state affairs? (4) The right to work as an attribute of socialist legality; and (5) The place, in socialist legal theory, of *nullum crimen sine lege.* Some attention was paid to this suggested order of discussion during the fifth and sixth sessions, but the order was then lost sight of. Colloquium interest waned noticeably as the two final sessions were given over to successive set speeches, quite unrelated to the five proposed topics, most of them by participants from the minor satellite countries.

If many of the Western "observer"-participants were disappointed by the discussions at the formal sessions, there were other respects in which the Warsaw colloquium exceeded all reasonable expectations. Conference arrangements were superbly handled. Unlike the morning-noon-and-night scheduling at many American meetings, formal *séances de travail* were kept down to a number permitting full opportunity for that most profoundly valuable form of cultural exchange, informal and friendly conversations among men cultivating similar intellectual gardens on the two sides of the Curtain. The General Report of the colloquium is in the course of preparation by Professor Rosmaryn, who will have before him, as a model, Professor C. J. Hamson's thoughtful General Report on last year's colloquium on the Rule of Law as understood in the West.

The American delegation to the Warsaw colloquium, all of whom were enabled to attend by a generous travel grant of the Ford Foundation, consisted of the following persons: Professors Kingman Brewster, Zbigniew Brezezinski, Milton Katz, and Arthur von Mehren of Harvard University; Professor Paul G. Kauper of Michigan; Dean Eugene V. Rostow of Yale; and Professors John N. Hazard and Harry W. Jones of Columbia.

HARRY WILMER JONES

COMPARATIVE LAW COLLOQUIUM IN CAMBRIDGE—The United Kingdom National Committee of Comparative Law held a two-day Colloquium in Cambridge, England, at Clare College on September 15th to 17th, 1958, immediately before the annual meeting of the Society of Public Teachers of Law. About 53 participated in the Colloquium which was under the general direction of the Committee's chairman, Professor J. N. D. Anderson of the School of Oriental and African Studies, University of London. Dr. L. Neville Brown of the Faculty of Law of the University of Birmingham, secretary of the Colloquium, handled the arrangements for the meeting. Two topics were discussed: (1) The Laws of the West Indies; and (2) The Co-existence and Interaction of the Different Laws of Marriage and Divorce in the British Commonwealth.

The participants divided into two groups. The group which considered the Laws of the West Indies was under the chairmanship of Professor O. R. Marshall of the Faculty of Law of the University of Sheffield, and the other group under the direction of Professor F. H. Lawson of Brasenose College, Oxford. There were also plenary ses-

sions in which the Laws of Marriage and Divorce applicable in both the West Indies and the British Commonwealth were discussed. Within the groups a great number of subjects were developed. Such subjects as Rights of Spouses, Ease or Difficulty of obtaining divorces under present Divorce Laws, the differences existing among the various parts of the Commonwealth as to formalities of contracting marriages and attitudes toward divorce were examined in the Marriage group. One topic which evoked considerable discussion was whether consent divorces should be permissible, especially where there were no children of the marriage. In the West Indian group, one of the main topics was the interaction of British and other laws upon the local law in such matters as matrimonial law and land law. However, the principal topic, which occupied most of the time, was the new Constitution of the West Indies Federation. The background and general outline of the Constitution were discussed as well as the Legislative, Judicial, and Executive powers thereunder.

A number of background papers covering the subjects to be studied were circulated as a basis for the discussions. They served a most useful purpose in that they gave the participants substantial knowledge of the subjects in advance of the meetings. These papers contained much interesting information, and the thought was expressed that the papers should be published in some manner so as to make this information readily available.

LEONARD OPPENHEIM

UNESCO INTERDISCIPLINARY CONFERENCE ON INTERNATIONAL UNDERSTANDING—A conference of political scientists, economists, sociologists, and jurists was held in Prague, September 24 to October 1, 1958, to advise UNESCO concerning its program on international understanding and peaceful co-operation. Most of the approximately 35 participants had attended one of the five conferences held during 1957–1958 under the UNESCO program—namely, the Munich conference of political scientists, the Moscow conference of sociologists, the two Rome conferences of jurists, and the Bursa, Turkey, conference of economists. At the Prague conference, it was generally agreed that the principle adopted previously of 50–50 participation of "East" and "West" should be abandoned in the future. Indeed, the Prague conference itself reflected a shift in policy in that respect, since there were present participants from Egypt, India, Israel, and Japan, as well as from Czechoslovakia, Hungary, Poland, Rumania, and the U.S.S.R., from Yugoslavia, and from Canada, France, the Netherlands, Sweden, Switzerland, the United Kingdom, and the United States.*

Two areas for future study were proposed. One was formulated as "the most desirable size and modalities of foreign assistance to developing countries." The other proposed area was that of economic relations between countries with different economic systems. With respect to the latter, a number of possible economic and legal studies were suggested. Most interest seemed to be concentrated on the topic, "Economic and legal measures for overcoming obstacles to trade between countries with different economic systems," and, as subdivisions of that topic, "trade and payments agreements," and "regional economic arrangements and their effects upon inter-regional trade." It was also proposed that an effort be made to draw up an international code of fair practices, similar in scope to the General Agreement on Tariffs and Trade, for trade between planned economies and countries whose foreign trade is predominantly private.

Apart from studies in which econo-

* There were four participants from the United States: Professors Everett C. Hughes of Chicago University, Klaus Knorr of Princeton University, W. R. Sharp of Yale University, and Harold J. Berman of Harvard University.

mists and jurists would collaborate, some topics in the sphere of international trade were proposed for economists and jurists separately. The proposed juridical studies were grouped under the heading, "Legal institutions for harmonious trade relations between countries with different economic systems." The special topics suggested under this heading were: (1) International commercial arbitration, (2) General conditions of sale, (3) The development of a common commercial custom and commercial law, and (4) The status and role of commercial and industrial public enterprises.

The proposals described above represent the area of general agreement among the participants present at Prague regarding the direction which the UNESCO "program on peaceful co-operation" should take in the future. In addition, there was a large area of disagreement, ranging from proposals that studies be made of the effects of armament programs on international economic relations to proposals that any future studies be confined to subjects which cannot be studied adequately by scholars in the various universities of the world without UNESCO sponsorship.

HAROLD J. BERMAN

INTERNATIONAL CONGRESS OF JUDGES—Sponsored by the International Union of Judges, a First International Congress of Judges was held in Rome, Italy, October 11–13, 1958. Two topics were on the agenda: 1. The Preparation of the Judge for his Office (Professional Training); 2. The International and Supranational Courts: their Characteristics and Basic Ends as they appear from International Conventions, and their Nature as shown by their Work and Possibilities of Development. The two general reports, as well as the national reports, will be published. Associations of judges from the following countries belong to the International Union: Austria, Belgium, Brazil, France, Germany, Italy, Japan, Luxemburg, and The Netherlands.

## VARIA

AMERICAN FOREIGN LAW ASSOCIATION—The thirty-third annual meeting of the American Foreign Law Association was held in New York City on March 24, 1958. The officers of the Association submitted their reports for the past year. Messrs. Miguel A. de Capriles, New York, David E. Grant, New York, John N. Hazard, New York, Kurt H. Nadelmann, Cambridge, Mass., were elected members of the General Council, Class 1961. The General Council elected the following officers of the Association: Otto C. Sommerich, president; Alexis C. Coudert, George J. Eder, W. Harvey Reeves, Hessel E. Yntema, vice-presidents; Joseph Dach, treasurer; Albert M. Herrmann, One Wall Street, New York 5, N. Y., secretary.

The Association held a number of luncheon meetings and a dinner meeting. Speakers at these meetings were: Prof. John N. Hazard, who spoke on "My Recent Impressions of Russia and Roumania"; Mr. George J. Eder, who spoke on "How a Return to Free Enterprise was Accomplished in Bolivia"; Prof. Harold Lasswell, who spoke on "Impact of Mass Psychology on International Law"; Prof. Joseph F. Schacht, of Leyden University, who spoke on "Doctrines Peculiar to Islamic Law"; Prof. Heinrich Kronstein who spoke on "German Cartel Law in 1957"; Prof. J. L. Montrose, of Queens University Law School, Belfast, Northern Ireland, who spoke on "Recent Innovations in the General Civil Law." On the occasion of the New York Conference of the International Law Association, a luncheon was offered to the foreign guests jointly with the American Society of International Law. Prof. Philip C. Jessup addressed the luncheon meeting on "New Challenges to the International Lawyer."

AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION—The 37th Annual Meeting of the American Branch of the International Law Association was held in New York City on

April 11 and 12, 1958. The opening session was addressed by Mr. Robert B. von Mehren, New York, who spoke on "The Development and Use of Nuclear Power—Some Reflections on Legal Problems." The speaker at the annual dinner was Mr. Oscar Schachter, Director, General Legal Division, United Nations. His topic was: "The Law of Outer Space." At the business meeting, the members elected Mr. Oscar R. Houston, of New York City, president of the Branch, to succeed Professor Clyde Eagleton, deceased. Vacancies on the Executive Committee were filled with Covey T. Oliver, Philadelphia, Pa., and Charles M. Spofford, New York, N. Y. The Branch committees reported on their work. Details were given on the plans for the coming Conference of the International Law Association to open in New York City on September 2, 1958.

Salzburg Seminar in American Studies—The sixth annual session of the Salzburg Seminar in American Studies devoted to American Legal Institutions was held at Schloss Leopoldskron in Salzburg, Austria, from June 15 to July 12, 1958. There were 61 participants from 14 countries: Austria 4; Belgium 2; Denmark 3; Finland 2; France 4; Federal Republic of Germany 10; Holland 7; Republic of Ireland 3; Italy 9; Norway 4; Sweden 2; Switzerland 3; United Kingdom (England) 5; United States 3 (residence). The Faculty was composed of: Professors Edward L. Barrett, School of Law, University of California (Berkeley); Clark Byse, Harvard Law School; Abram J. Chayes, Harvard Law School; Honorable Nathan L. Jacobs, Justice, Supreme Court of New Jersey; Professor Brunson MacChesney, Northwestern University School of Law.

In accordance with previous practice, the entire group of students met in general sessions six days a week to hear lectures on the Institutional Framework of American Law, followed by discussion. This year, this general survey included: the progress of a law suit, characteristics of the adversary system, choice of state or federal law, function of judge and jury, equitable and legal remedies, organization of courts in the Nation and the States, the role of the judge, statutory interpretation, federal and state relations in the American Constitutional system, the First Amendment and the area of civil liberties, procedural due process, growth of administrative regulation, constitutional status of independent agencies, the decisional process and judicial review in administrative law, legal aspects of the foreign relations power, and constitutional control of conflict of laws in the United States.

Seminars meeting six hours each week were also given in the following subjects: American Constitutional Law (Barrett), Selected Problems in the American Law of Contracts (Byse), Problems in American Corporation Law (Chayes), Structure and Organization of the Modern Judicial System (Jacobs), and Conflict of Laws (MacChesney).

Faculty and students participated in evening panel discussions of (1) prospects for Western European unification, (2) university life in the United States, and (3) civil liberties in the United States. There were mock trials designated to illustrate the different methods of disposition at common law and under a code. A hypothetical accident in the Schloss raised questions of negligence and of liability of a charitable corporation in tort. The first trial was conducted under the American system with the venue laid in the federal district court of Massachusetts. Judge Jacobs presided, and a jury composed of participants was selected. Professor Barrett represented the plaintiff (Mrs. Chayes) and Francis D. Fisher, of the Chicago Bar, appeared for the Salzburg Seminar. A demonstration of the German method of dealing with the same situation under German law took place a week later. Without a jury, the German participants portrayed the markedly different roles of court and counsel. Subsequently, the British participants discussed the division of labor between barrister and solic-

itor in England. These informal affairs as well as the opportunity for constant exchange of ideas made possible by eating and living together in the Schools enhanced the educational value of the Seminar.

Teaching at the Salzburg Seminar is a stimulating experience. It offers a challenge comparable to that currently presented in many American law schools by the growing number of foreign graduate law students. Apart from the linguistic handicaps, many of the participants had great difficulty in studying American cases and in adjusting to American methods of law teaching. The difficulty was more strongly felt in the lecture course than in the seminars. The faculty felt that special teaching materials should be prepared that would explain in the simplest terms the general features of our system and our teaching methods. Such materials, distributed in advance, would, in the faculty's opinion, greatly increase the value of the work at the Seminar. Such materials would also be useful as part of the teaching program for foreign law students in American law schools.

BRUNSON MACCHESNEY

INTERNATIONAL ACADEMY OF COMPARATIVE LAW: BRUSSELS MEETING—On August 4, 1958, at a meeting of the International Academy of Comparative Law at Brussels, in connection with the Fifth International Congress of Comparative Law, sponsored by the Academy, Louis Milliot of France was elected president to succeed the late R. W. Lee, Paul Esmein of France was elected treasurer, and P. Andrieu Guitrancourt of France and Helmut Coing of Germany were elected members.

INTERNATIONAL COMMITTEE OF COMPARATIVE LAW; WARSAW MEETING—On September 17, 18, 19, 1958, the International Committee of Comparative Law held in Warsaw, Poland, its annual session as the executive committee of the International Association of Legal Science. Messrs. Emil Sandström, president, H. N. Kubali (represented by T. B. Balta on the 17th), P. E. Orlowsky, S. Rozmaryn, F. de Sola Cañizares (also representing H. Valladão), Marc Ancel (representing J. Hamel), C. J. Hamson (representing R. Graveson), A. von Mehren (representing H. E. Yntema) and K. H. Neumayer (representing K. Zweigert), members of the Committee, attended the sessions. Also present were Messrs. Imre Zajtay, secretary general of the Association, and Kurt Lipstein, director of scientific studies. At the Committee's invitation, Messrs. André Bertrand, Associate Director of the Department of Social Sciences of UNESCO, P. S. Romachkin, and S. L. Zivs, both of the USSR, participated in the sessions, as did representatives of a number of national committees in an open session held on September 17. The Committee meeting immediately followed a Colloquium, sponsored by the IALS, on "The Concept of Legality in Socialist Countries."

A variety of matters were handled at the meeting. Dr. Imre Zajtay, who had been serving as Acting Secretary General, was elected Secretary General. The affiliations of the Swiss and Rumanian national committees were confirmed. Reports were received on the status of national bibliographies under preparation by various national committees. The Russian, Czech, and Yugoslavian bibliographies are to be published in the near future. The Committee decided to support a request that the Government of Luxemburg proposes to make to UNESCO for assistance in establishing at Luxemburg a Center of Documentations especially adapted to the needs of students of Comparative Law. Interest was reaffirmed in a projected comparative study of administration. There was a general discussion of the program of the IALS and its future course of development. It was decided to send a questionnaire to the national committees, soliciting their opinions on a variety of questions relating to the Association's future program, for example, the subjects that might be

studied with profit and the kinds of meetings that should be sponsored. H. E. Yntema's proposal, looking to substantial revisions of Association's Statutes was presented to the Committee. It was decided to circulate the project to the national committees for comment.

Plans were not fully finalized for the Committee's next meeting. It is hoped to meet in Lausanne, Switzerland, late in July, 1959. On this occasion, a colloquium is to be held on the reception of western law in Turkey. The colloquium discussions would continue those of the Istanbul meeting held in 1955.

ARTHUR VON MEHREN

INTERNATIONAL SOCIETY OF LABOR LAW AND SOCIAL LEGISLATION—A new international body, the "International Society of Labor Law and Social Legislation," was organized after adjournment of the Second International Congress on Social Law in Brussels. A constitution was adopted, Professor Paul Durand of France was elected president and an executive committee of nine chosen. The American member of this committee is Robert E. Mathews, Ohio State University. Alexandre Berenstein, of the University of Geneva, Switzerland, was designated secretary general. The stated purpose of this new organization is to engage in research and study of labor law and social legislation on both national and international levels, to exchange ideas and information, and to encourage as close co-operation as possible among practitioners and students in these fields. It will pursue these ends in a fashion that will be exclusively scientific and objective, entirely independent of political, philosophic, or religious considerations. Memberships will be encouraged throughout the world, and national committees will be set up in each country belonging to the International Labour Organization. Within the next few years, it proposes to hold a world conference on comparative labor law. The location has not yet been selected other than to decide that, in all probability, it will be somewhere in North America.

ROBERT E. MATHEWS

INTERGOVERNMENTAL COPYRIGHT COMMITTEE AND BERNE PERMANENT COMMITTEE MEET—The Intergovernmental Copyright Committee of the Universal Copyright Convention and the Permanent Committee of the Berne Copyright Union both met in Geneva in August, 1958. They decided to hold joint meetings on topics which appeared on the agendas of both Committees. The decisions were taken by the Committees sitting separately. The topics included: report on the activities in the field of the protection of performers, recorders, and broadcasters (neighboring rights); publications; protection of works of applied art; co-operation between intergovernmental organizations dealing with copyright. Concerning neighboring rights, the Committees endorsed the convening in 1959, by the Director-General of UNESCO jointly with the Director of the International Union for the Protection of Literary and Artistic Works, of a new Committee of Experts on Neighboring Rights.

The meetings were attended by representatives of the member countries and observers of non-member governments and international non-governmental organizations. The United States was represented by Arthur Fischer, Register of Copyrights, chairman for 1957–58 of the Intergovernmental Copyright Committee. Walter J. Derenberg represented the Copyright Society of the United States, admitted as observer.

DIPLOMATIC CONFERENCE ON MARITIME LAW—A Diplomatic Conference on Maritime Law was held at Brussels from September 30 to October 10, 1957, for the consideration of three draft conventions prepared by the *Comité Maritime International* at its conference at Madrid in September, 1955: on Limitation of the Liability of Owners of Seagoing Vessels, on Rules Relating to the

Carriage of Passengers by Sea, and on Stowaways. Thirty-two countries were represented. The United States Delegation consisted of Messrs. Clarence G. Morse, John W. Mann, Oscar R. Houston, and E. Robert Seaver. The Conference adopted the draft conventions on Liability of Owners of Seagoing Vessels and on Stowaways with some revisions. The draft convention on Rules for the Carriage of Passengers by Sea was revised substantially and set aside for further study before submission to some future diplomatic conference.

Belgian Inter-University Center of Comparative Law—As a result of an initiative of the Belgian law teachers, a new center for research in comparative law, called "Centre Interuniversitaire de droit comparé," was established in Belgium on March 6, 1957. It is located at Place Jean Jacobs 11, Brussels. As set forth in the by-laws, the purpose of the center is: to promote scientific research in comparative law, with the assistance of and in co-operation with the university departments, in particular, to find the means by which progress in legal science can be promoted through proper use of the comparative method; to study specific problems by which study the value of the comparative method will be demonstrated; to investigate problems of international unification of specific legal rules through use of the comparative method.

The center will study problems of scientific and actual interest. One of the first topics will be "The Repercussions of European Integration on National Legislation." Contacts with foreign research centers will be established. The center will work in co-operation with the Belgian Institute of Comparative Law, especially as regards publications. The benefits of the co-operation were demonstrated on the occasion of the 5th International Congress of Comparative Law held in Brussels in August, 1958.

The Board of Directors is composed of: Baron L. Fredericq, president; R. Piret, W. J. Ganshof van der Meersch, J. Constant, vice-presidents; J. Limpens, director; Jan Ronse, secretary; J. Baugniet, J. Dabin, R. Dekkers, Ch. del Marmol, H. De Page, P. Graulich, R. Liénard, A. Lilar, L. Moureau, M. Orban, Cl. Renard, G. van Hecke, J. van Houtte, J. Van Ryn. R Pauwels has been appointed assistant director.

Belgian Institute of Comparative Law—The Belgian Institute of Comparative Law has completed its first fifty years of existence. It was founded in January, 1908, as a result of an initiative of Emile Stocquart. It is best known abroad as publisher of the "Revue de l'Institut de Droit Comparé," which, since 1949, has appeared under the title, "Revue de Droit International et de Droit Comparé." The anniversary was celebrated at the time of the Fifth International Congress of Comparative Law, held in Brussels in August, 1958. M. F. Landrien, secretary general of the Institute since 1924, was the subject of special honors.

Round-Table on Draft Companies Bill for Israel—A round-table to discuss problems arising under the Draft Companies Bill for Israel was held in Luxemburg on the premises of the International Faculty of Comparative Law on September 1st and 3rd, 1958, under the sponsorship of the Harvard-Brandeis Co-operative Research for Israel's Legal Development and the Israeli Ministry of Justice. This was the fourth in a series of meetings, the purpose of which is to bring drafts of code-like legislation prepared in Israel under the scrutiny of experts from different countries. Previous meetings have been held in New York City on the Israeli Evidence and Succession Bills and in Chicago on the Draft Family Code for Israel.

The twenty participants, most of whom were present in Luxemburg to lecture on corporation law at the International Faculty of Comparative Law, included lawyers from Belgium, England, France, Germany, Holland, Israel,

South Africa, Sweden, and Venezuela. Law teachers from five American universities were also present. In addition, a number of students from the International Faculty sat in as observers.

Three sessions were held; Professor Louis Loss of Harvard Law School acted as chairman at the first and third sessions; Professor David R. Herwitz of Harvard chaired the second. The topic on Monday, September 1st, was "Allocation of Functions between the Directors and the General Meeting"; Professor Herwitz was the Reporter. The discussion focused on a provision of the Draft Companies Bill which purports to subordinate the directors to general meeting resolutions. The participants considered whether such subordination was desirable, whether a different rule should be provided for public as distinguished from private companies, and whether the subordination, if any, should extend to all business matters.

At the first session on Wednesday, September 3rd, Professor L. C. B. Gower of the London School of Economics reported on "Protection of Minorities." A spirited discussion followed in which the participants weighed various statutory devices for protecting minority shareholders—e.g., permitting the court to set aside resolutions and otherwise intervene in company business where "oppression" of a minority is proved; preventing directors from voting on matters in which they have an interest; and making provisions for shareholder derivative suits. Consideration was also given to one of the more perplexing questions in this area—how to define the group to which a director really owes a duty. Is it to be limited to former, present, or future shareholders, creditors, employees, customers, or the public generally? At the final session Dr. Uri Yadin of the Ministry of Justice in Israel and chief draftsman of the Bill reported on "Restrictions on the Payment of Dividends." He asked the meeting to consider the advisability of imposing statutory restrictions upon the power of a corporation to pay cash dividends from various sources—e.g., out of the profits of a current year despite losses in prior years, out of paid-in surplus, and out of surplus created by the revaluation of assets.

Minutes of these sessions have been prepared by the Harvard-Brandeis Cooperative Research for Israel's Legal Development.

NORMAN ABRAMS

UNITED NATIONS AND UNIFICATION OF LAW—A resolution was adopted by the United Nations Economic and Social Council at its 26th session, held in Geneva in July, 1958, on co-operation between the United Nations and the Hague Conference on Private International Law and the International Institute for the Unification of Private Law. Because of its general interest, we reproduce the text of the resolution which was sponsored by the Netherlands.

"The Economic and Social Council,

"Considering that a progressive unification of the rules of private international law and the unification and harmonization of the rules of private law in matters relating to international economic and social questions would facilitate the continued development of international commercial exchanges.

"Considering further that the scope of The Hague Conference on Private International Law and that of the International Institute for the Unification of Private Law include activities in the field indicated above,

"Noting that the programs of work of the regional economic commissions of the United Nations include projects of a similar nature,

"Being concerned to avoid duplication and overlapping in the respective programs of the United Nations and of other international organizations whose activities affect the economic and social fields,

"1. Requests the Secretary-General to take appropriate steps in order to ensure reciprocal exchange of information and documentation with the Hague

Conference on Private International Law and with the International Institute for Unification of Private Law in matters of mutual interest in order to promote co-operation and co-ordination with those organizations;

"2. Further requests the Secretary-General to report to the Council, whenever appropriate, on matters within this area of activities which may be of interest to the Council."

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS—The National Conference of Commissioners on Uniform State Laws held its 67th annual meeting in Los Angeles, California, from August 18–25, 1958, just prior to the 81st annual meeting of the American Bar Association. Principal actions were: approval of a Model Water Use Act and approval of amendments to the Uniform Reciprocal Support Act, recommended by the Commissioners in 1950 and since adopted by all the states and territories. In addition, the following were approved: Amendments to the Uniform Principal and Income Act; Uniform Disposition of Detainers Act; Amendments to the Uniform Narcotic Drug Act; Uniform Facsimile Signatures of Public Officials Act; Amendments to the Uniform Securities Act; Uniform Estate Tax Apportionment Act. With regard to new work, the Conference voted, among other things, to prepare for submission to the states a Uniform Recognition of Foreign [non-American] Judgments Act.

## ANNOUNCEMENTS

ELEVENTH CONFERENCE OF THE INTER-AMERICAN BAR ASSOCIATION—The eleventh Conference of the Inter-American Bar Association will be held in Miami, Florida, April 10–19, 1959. The program may be obtained from the headquarters office of the Association: 210 Portland Bldg., 1129 Vermont Avenue, Washington 5, D. C.

## IN MEMORIAM

ROBERT WARDEN LEE—R. W. Lee, who died on January 6, 1958, at the age of 89, was especially known as an expert on Roman-Dutch law, the character and importance of which he did more than anyone else to make known to the world at large.

He was educated at Balliol College, Oxford, of which the redoubtable Benjamin Jowett was still Master. He became an excellent classical scholar of the old humanist type, obtaining First Classes in Classical Moderations and the Final School of Literae Humaniores (Greats). After leaving Oxford he had a short career as a civil servant in Ceylon, retiring on medical advice.

It was in Ceylon that he became acquainted with Roman-Dutch law; but in the first part of his academic career Roman-Dutch law was rather a side line, for from 1899 to 1914 he was a very active law tutor at Oxford. During that period he taught English as well as Roman law and took part with Edward Jenks, John Miles, W. M. Geldart, and W. S. Holdsworth in a remarkable enterprise, the drafting of *Jenks's Digest of English Civil Law*, his part being the law of contract. He retained his interest in the work as late as 1938, when, with help, he revised his contribution for the third edition. It was doubtless his experience with *Jenks's Digest* that prompted him later to undertake the editorship, with A. M. Honoré, of a similar Digest of South African law. He had the clear and precise style of an elegant draftsman.

In 1914 he migrated to Canada for seven years to serve as Dean of the Faculty of Law and Professor of Roman Law at McGill University, Montreal. He was active in Canada in many ways and became a K.C. of the Bar of the Province of Quebec.

Having been called to the Bar at Gray's Inn in 1896, he was at one time briefed in appeals to the Privy Council, mainly from Ceylon. From 1906 he had held the part-time chair of Roman-

Dutch law at University College, London. It was therefore only natural that he should have been recalled to Oxford in 1921 as the first and only Rhodes Professor of Roman-Dutch Law. He held the chair until his retirement in 1955. He was also for many years Reader in Roman Law and Roman-Dutch Law to the Council of Legal Education, in which capacity he delivered lectures to generations of students for the English Bar. In one place or other, many inhabitants of South Africa and Ceylon who have since become distinguished were his pupils.

Lee will be remembered as an author mainly for four books. His *Introduction to Roman-Dutch Law,* five editions of which appeared between 1915 and 1953, is a classical book which could only have been written by one whose intimate knowledge of Roman and English law as well as of Roman-Dutch law enabled him to see the peculiar qualities of modern Roman-Dutch law and the debt it owed to Roman and English law as well as to the older Dutch writers. It is admirably clear, attractive, and well-proportioned, and is indeed the first book that might be recommended to anyone who wishes to understand the characteristics of a modern civilian system largely founded on Roman law. Probably every lawyer in South Africa and Ceylon at one time started his studies by reading it.

Lee was fortunate in the time when he wrote, for Roman-Dutch law, which had recently undergone a remarkable renovation at the hands of Lord de Villiers and other great judges, was still plastic and was developing rapidly. It deserved the attention of a keen-witted jurist with a capacious and co-ordinating brain. Lee followed up his book with a standard text, translation, and commentary of Grotius's *Introduction to the Jurisprudence of Holland,* the first and perhaps still the most influential of the great Dutch law books; and from 1950 onwards he took a leading part in editing the Digest of South African Law which has already been mentioned.

In 1944, after lecturing on Roman law for many years, he published his *Elements of Roman Law,* a book of great utility, which combined a translation of almost the whole of Justinian's Institutes with a clear systematic account of the main principles of Roman law and short indications of some of their developments in mediaeval and modern times. He was always greatly interested in those developments, not only in Holland and South Africa, and he wrote elsewhere on the *Usus Modernus Pandectarum.*

Lee would probably have regarded himself as a cosmopolitan rather than a comparative lawyer. He was an original member of the International Academy of Comparative Law organized by the late Elemer Balogh and eventually became its President—his emergency appointment was ratified posthumously. Few of his colleagues in the Academy set themselves any more deliberately than he to compare one law with another; and if to see the law one studies and teaches in a world setting and not as an isolated discipline is to be a comparative lawyer, Lee was assuredly one. He could hardly have been otherwise, for anyone who, like Lee, made himself an academic authority on one of the great hybrid legal systems, could not help being conscious at every turn of Roman law, English law, and the old customary laws of Western Europe. Indeed a learned South African lawyer must now be prepared to read and understand the modern laws of France and Germany, to say nothing of American law. Lee was acquainted with all these laws and at McGill he had acquired a first-hand knowledge of French-Canadian law, a law much more resistant than South African law to the infiltration of English law. An accomplished linguist and much-travelled man, he moved easily in foreign circles. His distinction was recognized by many learned institutions at home and abroad and he was elected a

Bencher, and later Treasurer, of Gray's Inn.

Lee was a debonair man who enjoyed life and company, with some detachment from both. His poker face and dry humour, at times verging on cynicism, made him a formidable leg-puller. Even his friends never knew quite where they had got him. An exact scholar himself, he could on occasion make devastating remarks about what he regarded as arid scholarship. A happy worker, he had the farsightedness and sense of proportion which prevented him from ploughing the sands. He had an exceptionally long working life and never seemed to grow old.

F. H. LAWSON

SALVATORE RICCOBONO—When Salvatore Riccobono died on April 12, 1958, in his ninety-fifth year, Roman legal learning lost a master who had enriched his chosen field and inspired generations of scholars for a much longer period than is given to most mortals. Trained by the great pandectists of the nineteenth century, he was the contemporary of Scialoja, Lenel, Gradenwitz, Bonfante; the senior of brilliant men like Albertario, Schulz, Jolowicz, or Collinet, all of whom he survived. Some of his work had given new directions to Roman law studies and stimulated debate before the first World War broke out, and he kept abreast of the most recent developments on legal history to the end of his life.

Born near Palermo on January 31, 1864, Riccobono received his law degree at the University of that city in 1889, then went to Germany for post-graduate work. After his return to his native country in 1893, and after several years of teaching in smaller universities, he obtained the chair of Roman law in Palermo in 1897. There he remained until 1932, when he was called to the University of Rome. Upon his retirement, he continued as professor at the Papal Institute *Utriusque Iuris* of the Lateran until, approaching the age of Nestor, he withdrew completely from formal teaching. He kept a vivid memory of the year he had spent lecturing in the United States in 1929/30; and he always remained deeply interested in the Riccobono Seminar of Roman Law in America which had been founded and named in his honor at the end of his stay over here.

Every hour he spent with his students, in class or outside, was for Riccobono an occasion to kindle the flame of enthusiasm for the law of Rome and to keep alive a passionate interest in its growth, from the Twelve Tables to Justinian and beyond—to the work of the mediaeval Glossators, whom he greatly admired; to the formative influence of Roman institutions and doctrines on the modern continental codifications of civil law and their offspring, the legal systems of not a few nations of the Far East and the Americas. When he was over ninety, he saw one of the major studies of his best years, the two consecutive articles he had published on the Roman *stipulatio* in 1914 and 1922, reissued in an English translation at Cape Town, in Roman-Dutch law country. The preface he wrote for this new edition in November 1954 ends on a note we may call Riccobono's creed: ". . . I still believe firmly that Rome and her wisdom can alone guide us to the truth."

Riccobono has often been presented—be it with praise, be it with impatience—as the Great Conservative among modern historians of Roman law. This characterization of a man who was, above all, a great individualist, is true to a point. Throughout his life, in a great number of closely argued studies, he maintained the thesis that all the changes which took place in Roman legal doctrines and institutions between the classical age and Justinian's codification are owing to an intrinsic, consistent, and specifically Roman development. He discounted the Hellenistic and Byzantine elements in this historical process which were stressed by the

predominant school of modern Romanistic thought, and he strongly dissented from the low opinion which, in the wake of sixteenth-century humanism, one branch of the modern interpolationist school professed with regard to Justinian's work of codification. He stressed the Christian influences on, and the Christian character of, the Emperor's work which an earlier tradition of scholarship had often disregarded or minimized.

And yet, a portrait of Riccobono as the rigid conservative would not do justice to his analytical and critical acumen, nor to the openness of his mind for new insights and new methods. While he was opposed, like Lenel, to the "hunting down" of interpolations for interpolations' sake, he knew how to use the instrument of a juridically informed, and often audacious interpolationist critique *con bravura*. He had strong convictions but he was not dogmatic. When F. Schulz published his brilliant *History of Roman Legal Science* (Oxford, 1946), a book which in many respects was clearly opposed to Riccobono's conceptions, he greeted it as a work of "capital importance" and averred that for his "vast storehouse of knowledge" its author could be compared only to Theodor Mommsen. He set out, it is true, to write a profound dissertation on the definition of law at the time of the Emperor Hadrian in order to refute an *obiter dictum* of Schulz's who had qualified the famous definition, "ius est ars boni et aequi" (Dig. 1.1.1.) as empty rhetoric. But on the other hand, in a remarkable review he wrote for an American journal (*Traditio,* 6 (1948), 374–7), he did not hesitate to reverse himself on the important question of alterations of classical texts in the early post-classical development, and thus to accept in some measure Schulz's opinion on a point he had previously strongly contested. And in the preface to the English version of his *Stipulatio* we read a word of disarming greatness: ". . . I must concede some validity to the opposing doctrines. . . ." Riccobono was then in his ninety-first year.

Twenty years ago, the writer of these pages had the privilege to teach on the same faculty in Rome as Riccobono and, once a week, to walk with him after classes from San Giovanni in Laterano to the Colosseum, where the old man used to take the street car home. Progress used to be slow, for he would often stop in the street when he became engrossed in the conversation or when, to prove a point, he pulled his pocket edition of the Digest out of the overcoat. As I look back, it seems to me that more problems of legal history became clear to me on these walks than in any book that has been written to this day.

STEPHAN KUTTNER